No. 14-10154

Title:	Stephen L. Voisine and William E. Armstrong, III, Petitioners v. United States
Docketed:	June 9, 2015
Lower Ct:	United States Court of Appeals for the First Circuit
Case Nos.:	(12-1213, 12-1216)
Decision Date:	January 30, 2015
Rehearing Denied:	March 31, 2015

Questions Presented

--Date--	------Proceedings and Orders----------
Jun 4 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 9, 2015)
Jul 1 2015	Order extending time to file response to petition to and including August 10, 2015.
Aug 3 2015	Order further extending time to file response to petition to and including September 9, 2015.
Sep 9 2015	Brief of respondent United States in opposition filed.
Sep 14 2015	Reply of petitioners Stephen L. Voisine and William E. Armstrong, III filed.
Sep 24 2015	DISTRIBUTED for Conference of October 9, 2015.
Oct 13 2015	DISTRIBUTED for Conference of October 16, 2015.
Oct 26 2015	DISTRIBUTED for Conference of October 30, 2015.
Oct 30 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
Nov 18 2015	Motion to appoint counsel filed by petitioners Stephen L. Voisine and William E. Armstrong, III.
Dec 2 2015	Motion DISTRIBUTED for Conference of January 8, 2016.
Dec 11 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 17, 2015.
Dec 17 2015	Brief of petitioners Stephen L. Voisine and William E. Armstrong, III filed.
Dec 17 2015	Joint appendix filed. (Statement of costs filed.)
Dec 21 2015	Consent to the filing of amicus curiae briefs in support of either party received from counsel for petitioners Voisine and Armstrong.
Dec 23 2015	SET FOR ARGUMENT ON Monday, February 29, 2016
Dec 23 2015	Brief amici curiae of Gun Owners Foundation, et al. filed.
Jan 4 2016	Record requested from the U.S.C.A. 1st Circuit.
Jan 11 2016	Motion to appoint counsel filed by petitioners GRANTED, and Virginia G. Villa, Esq., of St. Croix Falls, Wisconsin, is appointed to serve as counsel for the petitioners in this case.
Jan 12 2016	Record received from the U.S.D.C. District of Main The record is electronic and located

	on PACER, with the exception of SEALED records contained in 1 envelope.
Jan 15 2016	CIRCULATED.
Jan 19 2016	Brief of respondent United States filed. (Distributed)
Jan 25 2016	Brief amici curiae of National Indigenous Women's Resource Center, et al. filed. (Distributed)
Jan 25 2016	Brief amici curiae of Major Cities Chiefs and the International Brotherhood of Police Officers filed.
Jan 26 2016	Brief amici curiae of National Domestic Violence Hotline, et al. filed. (Distributed)
Jan 26 2016	Brief amicus curiae of Everytown for Gun Safety filed. (Distributed)
Jan 26 2016	Brief amici curiae of Child Justice, Inc., et al. filed. (Distributed)
Jan 26 2016	Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed. (Distributed)
Jan 26 2016	Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project, et al. filed. (Distributed)
Feb 18 2016	Reply of petitioners Stephen L. Voisine and William E. Armstrong, III filed. (Distributed)
Feb 29 2016	Argued. For petitioners: Virginia G. Villa, St. Croix Falls, Wis. (Appointed by this Court.) For respondent: Ilana H. Eisenstein, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

RECORD
AND
BRIEFS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2014
NO. _____

STEPHEN VOISINE and
WILLIAM ARMSTRONG III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

14-10154

MOTION TO PROCEED
IN FORMA PAUPERIS

Supreme Court, U.S.
FILED
JUN 04 2015
OFFICE OF THE CLERK

Petitioners, Stephen Voisine and William Armstrong III, through their attorney, Virginia G. Villa, respectfully move the court for permission to proceed in forma pauperis in connection with this Petition for Writ of Certiorari and any subsequent proceedings. Counsel was appointed under the Criminal Justice Act by the district court below and all proceedings since the original indictment all have been pursuant to the Criminal Justice Act, Title 18, United States Code, Section 3006(A), with respect to counsel. Petitioners' financial status have not materially improved since the inception of these proceedings.

Dated: June 4, 2015

Respectfully submitted,

ORIGINAL

VIRGINIA G. VILLA
Attorney for Petitioners
2689 230th Avenue
St. Croix Falls, WI 54024

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No. 14-10154

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

STEPHEN VOISINE and
WILLIAM E. ARMSTRONG, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Supreme Court, U.S.
FILED
JUN 04 2015
OFFICE OF THE CLERK

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QUESTIONS PRESENTED FOR REVIEW

1. Does a misdemeanor crime with the *mens rea* of recklessness qualify as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?

2. Are 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9) unconstitutional under the Second, Fifth, and Sixth Amendments and the Ex Post Facto Clause of the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. None of the parties are corporations.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

STEPHEN VOISINE and
WILLIAM ARMSTRONG III,

Petitioners,

v

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioners, Stephen Voisine and William Armstrong III , respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceedings on January 30, 2015.

INTRODUCTION

Petitioners challenge their convictions under 18 U.S.C. § 922(g)(9) on statutory and constitutional grounds. If a question can be resolved on statutory grounds, the constitutional question need not be reached. Petitioners first address why the constitutional question should be reviewed to highlight the conflicts this Court's prior decisions have created by giving the statute a very broad reading without contemporaneously considering constitutional questions. In *United States v. Hayes*, 555 U.S. 415 (2009), the Court created a new federal crime of a

misdemeanor crime of domestic violence, all the elements of which need not be plead or proven in the court in which the misdemeanor conviction was had. In *United States v. Castleman*, 134 S.Ct. 1405 (2014), the Court declared that "misdemeanor crimes of domestic violence" include non-violent offensive contact infractions. These decisions divorce the basis of a firearm prohibition from constitutionally created procedural and substantive protections. They also weaken the connection between the purpose of the statute, to decrease firearm violence in domestic situations, from a preceding event, a prior misdemeanor conviction, in that reckless and non-violent acts are poor predictors of future intentional acts of violence.

The First Circuit followed this Court's example of reading the statute broadly. Petitioners request the Court to grant review as statutory matter as this broad reading directly conflicts with binding precedent of this Court. It also creates a conflict within the Circuits regarding the meaning of the phrase "use of force" as contained throughout the federal criminal code. Finally, such broad reading would further weaken the connection between the identified purpose of the statute and the means of reaching that goal. Disconnecting the ends and means renders the statute constitutionally frail. These questions merit review.

OPINIONS BELOW

This case comes back to this Court after remand to the United States Court of Appeals for the First Circuit. *See Armstrong v. United States*, 134 S.Ct. 1759 (2014). The opinion of the Court of Appeals for the First Circuit on remand of the unified cases of Petitioners Voisine and Armstrong is reported at 778 F.3d 176, and is reprinted in the attached Appendix A. Denial of rehearing and rehearing en banc in these cases is unreported and reprinted in the attached Appendix B.

The judgment of the United States District Court for the District of Maine (John A. Woodcock, Jr., C.J.) for both Petitioners Armstrong and Voisine have not been reported and are reprinted in the attached Appendices C and D. The District Court Orders denying the Motion to Dismiss are unpublished and are reproduced in the attached Appendices E and F

JURISDICTION

Petitioners stand convicted by way of conditional guilty pleas in the United States District Court for the District of Maine. The Honorable John A. Woodcock, Jr., Chief United States District Judge for the District of Maine imposed a sentence of three years probation on Petitioner Armstrong. The same judicial officer imposed a sentence of a year and a day on Petitioner Voisine.

The United States Court of Appeals for the First Circuit affirmed in a published opinion as to Petitioner Armstrong and in an unpublished opinion as to Petitioner Voisine filed January 18, 2013. Both men filed petitions for rehearing and rehearing en banc, and both were denied on February 8, 2013.

Petitioners filed a joint petition for certiorari review in this Court on May 6, 2013. The Petition was granted, the judgment of the First Circuit vacated and the cases remanded for reconsideration in light of *United States v. Castleman*, 134 S.Ct. 1405 (2014) by Order entered March 31, 2014. *See Armstrong v. United States*, 134 S.Ct. 1759 (2014).

The First Circuit again re-affirmed the convictions in a published opinion entered on January 30, 2015. Petitioners filed a petition for rehearing and rehearing en banc on February 13, 2015. The First Circuit denied the petition on March 30, 2015.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. Const., Article I, Sec. 9, Cl. 3:

No bill of attainder or ex post facto Law shall be passed.

U.S. Const., amend. II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 921(a)(33)(A):

Except as provided in subparagraph (c), the term "misdemeanor crime of domestic violence" means on offense that--

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 922(g)(9):

It shall be unlawful for any person--

***

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

17-A M.R.S.A. § 207 (Assault):

1. A person is guilty of assault if:

A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person. Violation of this paragraph is a Class D crime ...

17-A M.R.S.A. § 207-A (Domestic Violence Assault):

1. A person is guilty of domestic violence assault if:

A. The person violates section 207 and the victim is a family or household member as defined in Title 19-A, section 4002, subsection 4. Violation of this paragraph is a Class D crime ...

19-A M.R.S.A. § 4002:

4. Family or household members. "Family or household members" means spouses or domestic partners or former spouses or former domestic partners, individuals presently or formerly living together as spouses, natural parents of the same child, adult household members related by consanguinity or affinity or minor children of a household member when the defendant is an adult household member and, for the purposes of Title 15, section 1023, subsection 4, paragraph B-1 and Title 15, section 1094-B, this chapter and Title 17-A, sections 15, 207-A, 209-A, 210-B, 210-C, 211-A, 1201, 1202 and 1253 only, includes individuals presently or formerly living together and individuals who are or were sexual partners. Holding oneself out to be a spouse is not necessary to constitute "living as spouses." For purposes of this subsection, "domestic partners" means 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

STATEMENT OF THE CASE

1. Petitioner Voisine pled guilty on February 2, 2004 to a misdemeanor simple assault conviction pursuant to 17-A M.R.S.A. § 207(1)(A). The charging document to which he pled guilty alleged the crime in generic terms, stating that he "did intentionally, knowingly, or recklessly, cause bodily injury or offensive physical contact" to the named victim. The state court plea colloquy exists of a single page in which Mr. Voisine's lawyer informed the court that the matter would result in a

plea pursuant to a negotiated settlement of a two hundred dollar fine, and that Mr. Voisine understood this was the negotiated settlement.

2. Petitioner Voisine came to the attention of federal authorities in 2009 in relation to an investigation of his shooting an immature bald eagle. In examining his criminal history, federal authorities noticed Petitioner Voisine's prior conviction for simple assault dating from 2004.

3. Petitioner Armstrong pled guilty on December 30, 2008 to a misdemeanor Domestic Violence Assault under Maine statute 17-A M.R.S.A. 207-A(1)(A), which incorporates simple assault and adds a relationship element. The charging document to which he pled guilty alleged the simple assault portion of the offense in generic terms, stating that he "did intentionally, knowingly, or recklessly, cause bodily injury or offensive physical contact" to the named victim, and added that this "conduct was committed against a family or household member as defined by 19-A M.R.S.A. § 4002(4)." The relationship between the named victim and Petitioner was not set forth in the charging document. The prosecutor recited no factual basis for the plea, but only recorded that it was due to an offer to recommend a sentence of 180 days, with all but 24 hours suspended (time served), one year of probation, and a $10 fee. After pleading guilty, Petitioner was released and returned home. Petitioner completed the state-imposed term of probation without incident.

4. In May, 2010, based on an unrelated investigation, Maine State Police obtained a search warrant for Petitioner Armstrong's residence. During execution of the warrant on May 11, 2010, the police noticed numerous firearms and ammunition. The officers reported the presence of the firearms and ammunition to the Bureau of Alcohol, Tobacco and Firearms [ATF]. No criminal charges resulted from the state search warrant.

5. Based on the report of firearms in Petitioner Armstrong's household, and having confirmed his misdemeanor assault conviction from 2008, ATF agents obtained a federal search warrant for Petitioner's household. Searching officers recovered ammunition, and later (with Petitioner Armstrong's help) discovered firearms belonging to him at the residence of a friend of the family. ATF agents left the seven firearms identified as belonging to Petitioner Armstrong at the friend's residence with instructions not to return them to Petitioner Armstrong.

6. An Information charging one felony count of possession of firearms in violation of 18 U.S.C. § 922(g)(9) and one misdemeanor count of killing a bald eagle was filed against Petitioner Voisine on March 11, 2011. An Indictment charging Petitioner Armstrong with possession of firearms in violation of 18 U.S.C. § 922(g)(9) based on the 2008 assault conviction was filed in the United States District Court for the District of Maine on April 13, 2011.

7 Petitioners moved to dismiss on two grounds: for failing to state a federal offense in that a recklessly committed offensive physical contact does not meet the definition of a "misdemeanor crime of domestic violence," and that, if such a conviction satisfies the statutory definition, the statute is rendered unconstitutional as abrogating a Second Amendment right without a sufficient basis for doing so. The District Court denied the motions by an order entered on July 8, 2011 for Petitioner Armstrong and on April 14, 2012 for Petitioner Voisine. Petitioners entered pleas conditioned on their right to appeal the denial of the motions to dismiss. The District court sentenced Petitioner Voisine to a year and a day in prison and a $100 special assessment on February 13, 2012, and sentenced Petitioner Armstrong to three years probation, a $2,500 fine and a $100 special assessment on February 14, 2012.

8. On the initial appeal, Petitioners challenged their convictions based on statutory interpretation grounds and the Second and Fifth Amendments.

9. The United States Court of Appeals for the First Circuit affirmed in a published opinion as to Petitioner Armstrong and an unpublished opinion as to Petitioner Voisine filed on January 18, 2013. Both men filed petitions for rehearing and rehearing en banc, which were denied on February 8, 2013. They filed a joint petition for certiorari with this Court on May 6, 2013.

10. This Court entered an order on March 31, 2014 granting the petition, vacating the judgment of the First Circuit, and remanding for reconsideration in light of the decision in *United States v. Castleman*, 134 S.Ct 1405 (2014).

11. On remand, Petitioners argued that the issue as to whether reckless conduct could be encompassed in the phrase "use ... of physical force" was foreclosed by the decision of this Court *United States v. Castleman*, 134 S.Ct. 1405 (2014). Petitioners also raised a new constitutional argument based on the intervening decision in *Descamps v. United States*, 133 S.Ct. 2276 (2013). The First Circuit, in a split decision, rejected these arguments on substantive grounds and again affirmed. The Court denied a petition for rehearing and rehearing en banc on March 30, 2015. Petitioners again seek review in this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S TWO PRIOR DECISIONS INTERPRETING 18 U.S.C. § 922(G)(9) CREATE CONFLICTS WITH CASES ESTABLISHING CONSTITUTIONAL LIMITS ON CONGRESSIONAL ACTION; REVIEW IS NECESSARY TO RESOLVE THESE CONFLICTS

The decision in *United States v. Hayes*, 555 U.S. 415 (2009) created an extraordinary statutory framework otherwise unknown in American jurisprudence: it held that for 18 U.S.C. §921(a)(33)(A), "the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession

prosecution, need not be a defining element of the predicate offense." *Id.*, 555 U.S., at 418, *see also United States v. Voisine*, 1st Cir. No. 12-1213, slip op. at 27 (1st Cir. 2015)(rejecting constitutional challenge based on Fifth and Sixth Amendments), Appx. A. The curiousness of this result becomes apparent when one realizes that Section 922(g)(9) mentions no element regarding a domestic relationship, but only predicates a firearms prohibition on a prior misdemeanor conviction. The domestic relationship element appears only in the definition in Section 921. This definition limits the type of qualifying misdemeanor conviction. Separating the domestic relationship element from the underlying conviction presents real, and continuing, conflict with other decisions of this Court interpreting procedural protections, as well as substantive limits, established by the Constitution. This conflict can only be resolved by this Court.

A. *Hayes* conflicts with *Castleman, Descamps, Shepard,* and *Taylor*:

The decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), presumes that the categorical approach first announced in *Taylor v. United States*, 495 U.S. 575 (1990) applies to Section 922(g)(9). *See Castleman*, 134 S.Ct., at 1413. The most recent interpretation of the limitations exacted by *Taylor* was announced in *Descamps v. United States*, 133 S.Ct. 2276 (2013). The federal indictment charged Stephen Voisine with a violation of 18 U.S.C. § 922(g)(9) and listed a single qualifying predicate: a 2004 conviction for simple assault. The Maine statute under which he was convicted lists no element of domestic relationship. *See* 17-A M.R.S.A. § 207. The criminal complaint and the plea colloquy are silent as to the relationship between Petitioner Voisine and the named victim. All of the documents present in the prior conviction contain nothing regarding a necessary element of a qualifying conviction: the domestic relationship. The domestic

relationship was not established until the federal proceeding. *Hayes* allows this procedure.

That such procedure conflicts with the decision in *Descamps* can be seen if one substitutes the particulars of Voisine for those in *Descamps*:

> The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic [misdemeanor crime of domestic violence] and the crime established in § [207]. The former requires a [limited number of domestic relationships]. The latter does not, and indeed covers simple [battery against a stranger.] In *Taylor 's* words, then, § [207] "define[s] [simple assault] more broadly" than the generic offense. 495 U.S., at 599, 110 S.Ct. 2143. And because that is true—because [Maine], to get a conviction, need not prove that [Voisine battered his domestic partner]—a § [207] violation cannot serve as [a § 922(g)(9)] predicate. Whether [Voisine] *did* [batter his domestic partner] makes no difference. And likewise, whether he ever admitted to [battering his domestic partner] is irrelevant.

Id., 133 S.Ct., at 2285-2286 (alterations added, emphasis in original). Due to the number of people convicted of simple assault prior to (and after) Maine's adoption of a domestic violence assault statute in 2007, those convicted of a violation of 17-A M.R.S.A. § 207 fall into Petitioner Voisine's situation.

For Petitioner Armstrong, the *Hayes* procedure conflicts with *Shepard v. United States*, 544 U.S. 13 (2005). Petitioner Armstrong's prior conviction was had under 17-A M.R.S.A. § 207-A, which covers domestic violence assault in Maine. This statute adds to simple assault the element of a domestic relationship, which by statute includes "adult household members related by consanguinity," 19-A M.R.S.A. § 4002(4). This means a conviction under 17-A M.R.S.A. § 207-A may be had for an assault against a sibling, aunt, or other relative not included in 18 U.S.C. § 921(a)(33)(A). Mr. Armstrong's federal Indictment lists one conviction from 2008 as the predicate offense. The criminal complaint named a victim but did not allege if she is the Petitioner's wife, sister, aunt, or other female relative. The state court change of plea transcript only referred to her as "Ms. Armstrong" but did not identify the relationship between the two.

As in Mr. Voisine's case, the domestic relationship was established only in the federal proceeding. No document created in the prior Maine state court proceeding evinced this element. This is a procedure specifically forbidden in *Shepard*. "Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [domestic violence assault] not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Descamps*, 133 S.Ct., at 2286. *Hayes* envisioned using other documents or types of proof due to the absence of a domestic relationship element in a number of state jurisdictions. It conflicts with *Castleman* and the line of cases which began with *Taylor* because it does not limit evidence to judicial documents created in the prior proceeding.

The simple answer to why *Hayes* does not follow *Taylor* and its progeny is because those cases were predicated on the notion that Fifth and Sixth Amendment violations occur if a necessary element of a prior conviction is established by a judicial factfinder in a later proceeding by a preponderance of the evidence. As set forth in *Descamps:*

> Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits. But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. *See [United States v.] Aguila-Montes*, 655 F.3d [915], ... 937 [(9th Cir. 2001)]. And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.

Id., 133 S.Ct. at 2288 (alterations added). *Hayes* commands that the domestic relationship element must be found by a jury, albeit one that sits in a later, separate, proceeding. The timing of the *later* jury guarantee in *Hayes* as to a necessary element of a *prior* conviction creates other, serious, constitutional infirmities.

B. By creating a statute that allows deprivation of firearm rights based on a prior misdemeanor conviction that has no domestic relationship element, and allowing such element to be proven in a later federal proceeding, Congress violated the Fifth and Sixth Amendments:

A person shall not "be deprived of life, liberty, or property" without due process of law. U.S. Const., amend. V In criminal proceedings, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const., amend. VI. Under the construction of Section 922(g)(9) set forth in *Hayes*, *all* persons with *any* misdemeanor assault conviction are banned from possessing firearms, even those whose convictions were not domestic violence cases.

This result of *Hayes* is confirmed by the interpretation given to the ruling by the Federal Bureau of Investigation, whose responsibility it is to administer the national instant-check system required when a firearm is purchased from a federally licensed dealer. As can be seen by the letter contained in Appendix G, the FBI includes as prohibitory convictions misdemeanors such as Disorderly Conduct, even though the listed elements of the conviction have no domestic relationship element. *See id.* This is a reasonable interpretation, in that Section 922(g)(9) only

requires a prior conviction. The *Hayes* decision separated out the domestic relationship element for later prosecution.

The practical effect of *Hayes* is to have all non-violent misdemeanor convictions act as prohibiting convictions. Although § 922(g)(9) seems to prohibit those with a prior misdemeanor crime of *domestic* violence, *Hayes* held that the domestic relationship need not be an element of the prior offense of conviction. Only those with prior convictions qualify for the prohibition. *See* 18 U.S.C. § 922(g)(9). *Hayes* allows a firearm prohibition of all persons having a prior conviction for a misdemeanor crime based on facts unrelated to the elements of prior conviction. *See* Letter, Appx. G. Such persons become prohibited with *no* jury *ever* having found the necessary statutory elements and the burden of proof shifts to the firearm purchaser. This process abrogates the Fifth Amendment Due Process Clause and the Sixth Amendment jury clause. Creating the prohibition upon conviction of an offense with less than all necessary elements deprives persons of liberty and property interests without any *contemporaneous* proceeding in which to establish the prohibiting element.

It also violates the Sixth Amendment notice clause. By separating the element of a domestic relationship from the underlying offense, a person would understandably be unaware that she has been convicted of such a crime. In fact she has not been so convicted, because a necessary element has not been established. But she will be treated as if she has been convicted; otherwise the prior conviction rule cannot be administered within the instant check system.[1]

C. Section 922(g)(9) conflicts with the Ex Post Facto clause:

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[1]The Court currently is considering the constitutional problems involved in creating predicate convictions based on conduct independent of the elements of a prior conviction in *Johnson v. United States*, S.Ct. No. 13-7120 (argued April 20, 2015).

As discussed above, reading *Hayes* as prohibiting firearm possession as to all misdemeanants, where the federal statute requires a domestic relationship as an element, creates Fifth and Sixth Amendment problems. If this is not a correct reading of *Hayes*, then no person with a misdemeanor convictions is prohibited *until* the domestic relationship element has been pled and proven in the federal proceeding. It is this latter scenario that *Hayes* appears to contemplate. This reading also renders conduct that was legal at the time it occurred into a criminal act at a later date.

If all persons prosecuted pursuant to § 922(g)(9) *cannot* have the required prior conviction until the fact-finder in the federal proceeding has established the necessary domestic relationship, possession of firearms at the time charged (which always proceeds the fact-finding stage of federal proceedings) was legal and remains legal until the final element of the prior conviction has been proven. Yet, "No bill of attainder or ex post facto Law shall be passed." U.S. Const., Article I, Sec. 9, Cl. 3. An ex post facto law makes an act, legal when performed, subsequently illegal. *See Calder v. Bull*, 3 U.S. 386, 390 (1798)(holding that the Ex Post Facto clause prohibits "Every law that makes an action ... innocent when done, criminal; and punishes such action"). Pursuant to *Hayes*, Petitioners' acts of possession of firearms was legal (because they did not have the required prior conviction), up until the dates of their conditional guilty pleas, at which time they both admitted the element of the appropriate domestic relationship. At the time of their conditional guilty pleas they no longer possessed firearms. *See Henderson v. United States*, 135 S.Ct. __ (May 18, 2015)(holding that firearms in the possession of law enforcement or third parties do not constitute "possession" within the meaning of 18 U.S.C. § 922(g) as long as a defendant does not exercise control over the firearm).

This is a classic Ex Post Facto scenario, in that it makes an action, the possession of firearms, legal at the time committed (due to the absence of all elements of a qualifying conviction), illegal at a later date (the conditional guilty plea proceeding), without the defendant having repeated the conduct after the prohibiting event occurred. Petitioners have been punished for possessing firearms at a time when they did not have qualifying prior convictions and therefore could lawfully possess them. They did not possess firearms by the time they were convicted of a qualifying predicate offense. The Constitution forbids this punishment.

D. *Hayes* conflicts with *Morrison* and the doctrine of limited federal jurisdiction:

The separation of the domestic element from the underlying misdemeanor conviction has yet another constitutional problem: limits on the extent of federal jurisdiction. Where a prior conviction has federal consequences, all of the elements of that prior conviction usually must be established in the prior proceeding.[2] *Hayes* held that the element of domestic relationship can be proven in a subsequent federal prosecution. *Hayes* thus recognized that a "misdemeanor crime of domestic violence" consists of elements passed by state legislatures, as well as an additional element (the domestic relationship) passed by Congress. If the state law did not establish a qualifying predicate crime (the problem identified in *Hayes*), then Congress did so.

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[2]One exception is the creation of categories of crimes that are not enumerated in the federal statute, such as occurs in catch-all provision in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)(including as a predicate conviction any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another"). This provision has spawned a number of decisions trying to establish a workable system for determining which crimes fit within its purview, and most recently has caused this Court to consider whether the statute is unconstitutionally vague. *See Johnson v. United States*, S.Ct. No. 13-7120 (argued April 20, 2015).

Our Constitution is a charter for a federal government of limited powers. Under this charter the "States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). If an assault is not committed within the confines of territories with special federal criminal jurisdiction, *see e.g.* 18 U.S.C. § 13 (Assimilated Crimes Act), then it *cannot*, consistent with the Constitution, be prosecuted in federal court.

The Constitution gives Congress the power to regulate interstate commerce, U.S. Const., Art. I, § 8, cl. 3, and it can regulate commerce in firearms. Congress can preclude a person who is a felon from receiving or possessing a firearm that has moved in interstate commerce. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Congress cannot create a generally applicable misdemeanor crime of domestic violence under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598 (2000)(holding that section of Violence Against Women Act allowing for federal civil remedy for gender-based violence unconstitutional as exceeding federal authority). In other words, Congress cannot create the underlying misdemeanor crime in non-federal enclaves and then proscribe firearm transactions based on that crime. The decision in *Hayes* permits this otherwise proscribed action by converting an element of a qualifying conviction into a matter of exclusive federal legislation.

E. Extending § 922(g)(9)'s firearm prohibition to non-violent and reckless misdemeanor convictions impacts a constitutionally protected activity (possession of firearms) based on a factor (a prior misdemeanor conviction) that an bears insufficient nexus to the harm sought to be addressed (domestic firearm violence)

Some of the greatest challenges we face as a nation is to address identifiable threats with a reasoned response. Petitioners do not dispute that "Firearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S., at 427 They do dispute that non-violent, reckless misdemeanor convictions accurately predict future domestic firearm violence. The Court in *Castleman*

extended the definition of a "misdemeanor crime of domestic violence" to one that includes non-violent conduct on the premise that Congress meant to give Section 922(g)(9) a broad reading. The First Circuit extended this reasoning to include reckless offenses. The question presented is whether such a broad application follows constitutional limitations on congressional action.

Castleman noted that "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *Id.*, 134 S.Ct., at 1408. The Court did not factor into this equation the number of deaths from domestic violence preceded by non-violent misdemeanor convictions, or deaths perpetrated without a firearm. Even taking the numbers cited by the Court at face value, the rate of assaults compared to the rate of deaths in any one year is approximately one in one thousand. If one looks through the telescope from the end-point of a crime of violence committed with a firearm, one may find prior instances of domestic battery. If one looks through the other end of the telescope, beginning with the pool of those convicted of domestic battery, one must search far and wide to find an instance of firearm violence. The question presented is whether a misdemeanor conviction is a sufficiently precise predictor of those who will engage in domestic misconduct with a firearm to survive constitutional scrutiny.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, *supra*, this Court established that the Second Amendment protected an individual's right to possess and carry firearms. *See id.*, 554 U.S., at 592. The Court so held even though "[they were] aware of the problem of handgun violence in this country, and [they took] seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution." *Id.*, at 636 (alterations added). Prohibiting firearm possession nationally

would undoubtedly reduce firearm violence. *Heller* decided that individual rights, as recognized in the Constitution, trump wholesale disarmament. The question presented by *Castleman* and the First Circuit's decision in *Voisine* is whether *Heller* forecloses a broad based ban on firearm possession for reckless and non-violent misdemeanor convictions. The case presents this question because the numbers recited in *Castleman* indicate that most "domestic violence assaults," as defined in *Castleman*, are committed by persons who will never physically harm a loved one.

i. Section 922(g)(9), applied to non-intentional or non-violent conduct, cannot withstand strict scrutiny

There are normally three levels of scrutiny that may apply to legislation challenged as unconstitutional: strict scrutiny, intermediate scrutiny, and rational basis review. If a rational basis inquiry controlled, then because firearms are dangerous weapons and because domestic strife can lead to injury, limiting access of firearms to those involved in any domestic strife is a rational response. This Court held that a rational basis level of review cannot be applied to Section 922(g)(9). *See Heller*, 554 U.S., at 628, n. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

This leaves the Court with either of two levels of scrutiny that can apply: strict or intermediate. "Strict scrutiny" requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest in order to survive" a constitutional challenge. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Cases applying strict scrutiny all relate to core constitutional rights. This Court applied strict scrutiny in striking down certain election laws prohibiting a class of speaker (corporations) from any political speech. *See Citizens United v. FEC*, 558 U.S. 310 (2010). In determining that the law at issue must be subjected to strict scrutiny,

the Court indicated that political speech was the target of the law in question, striking at the core function of the First Amendment. It did not matter that the proscription applied to a "disfavored speaker," namely corporations, but rather that the ban, backed by criminal sanctions, proscribed a core constitutional interest. Where the Court has applied a lesser standard of scrutiny, it has balanced the nature of the speech against narrowly identifiable government interests, such as prison security, *see e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977), or the integrity of public school education. *See e.g. Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

The law at question here arguably strikes at the core interest protected by the Second Amendment: the right to keep firearms in the home. Section 922(g)(9) does not proscribe all firearm possession, just as the law at issue in *Citizens United* did not proscribe all political speech. Both laws target "disfavored" populations: corporations in one instance, and those convicted of misdemeanors in the other.

As in *Citizens United*, it is the "narrow tailoring" that is absent in Section 922(g)(9). Taking Maine as an example, documented cases of domestic violence homicide can occur where the perpetrator has no prior conviction or documented evidence of domestic violence. For instance, in a highly publicized case in which a man shot his wife of 30 years, there had been no indication of prior domestic violence, according to the prosecuting attorney. See "Brooks man who killed wife sentenced to 35 years," Bangor Daily News (October 28, 2011).[3] In other notable cases, no incidence of prior domestic arrests are listed. See "Maine: Man Kills His Wife, 3 Children and Himself," New York Times (July 28, 2014);[4] "Couple's deaths

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[3]Available online at http://bangordailynews.com/2011/10/28/news/midcoast/brooks-man-who-killed-wife-sentenced-to-35-years/

[4]Available online at http://www.nytimes.com/2014/07/29/us/maine-man-kills-his-wife-3-children-and-himself.html?_r=0

in Fryeburg were murder-suicide, police say," Portland Press-Herald (January 27, 2015).[5] Although this last article indicates that 14 of the 21 homicides in Maine during 2014 were due to domestic violence, there is no corresponding information regarding how many of those incidents were preceded by misdemeanor convictions involving aggression of the perpetrator toward the victim. Also, there is no information that the 14 domestic homicide cases all involved firearms. If the five homicides noted in the article from 2014 (where there was no prior conviction) are included in the 14 domestic violence deaths noted in the last article, then such numbers lose their persuasive impact in promoting disarmament based on a prior misdemeanor conviction.

There are many who, like Petitioners, have misdemeanor convictions for non-violent reckless offenses who have never physically harmed their loved ones. The statute is both over-inclusive (as it includes too many who engage in no harm to family members), and under-inclusive (as failing to include those who have no prior conviction). A jacket that has arms too long and a waist too small is hardly a good fit.

ii. Section 922(g)(9), applied to non-intentional or non-violent conduct, cannot withstand intermediate scrutiny:

The question may be closer in an intermediate scrutiny context. *See e.g. United States v. Staten*, 666 F.3d 154 (4th Cir. 2011)(rejecting as-applied Second Amendment challenge on intermediate scrutiny basis). In this analysis, the Government must show a "substantial relationship" between the policy to be addressed and the law being scrutinized. In the realm of First Amendment cases, intermediate scrutiny has been applied where the nature of speech was a step removed from that targeted by the First Amendment, for instance, commercial

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[5]Available online at http://www.pressherald.com/2015/01/27/police-investigating-2-deaths-in-fryeburg/

speech as opposed to political speech. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1996), the Court evaluated the constitutionality of a provision of the Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content. According to the Court, the analysis of the provision's constitutionality must focus on "the substantiality of the interest" in question, *id.*, at 483, and whether the provision advanced that interest "in a direct and material way." *Id.*, at 491. To meet its burden, the government had to provide "proof that its means will alleviate the real harms to a material degree." *Id.* at 487, citing *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). The government failed to satisfy this "critical" requirement and the Court struck down the provision. *See Rubin*, 514 U.S. at 487.

It has been almost 20 years since Section 922(g)(9) was enacted and it would appear that the effectiveness of this section in preventing domestic homicides should be apparent. It is not. We do not understand the factors that drive homicide statistics. "In 2011, an estimated 14,610 persons were victims of homicide in the United States, according to FBI data on homicides known to state and local law enforcement (figure 1). This is the lowest number of homicide victims since 1968, and marks the fifth consecutive year of decline." BJS, Patterns & Trends: Homicide in the U.S. Known to Law Enforcement, 2011, Figure 1 (Dec. 2013).[6] The overall rate of homicides has steadily decreased over time, except for a "bulge" from approximately 1973 to 1993. *See id.* Although the rate at which homicides occur has decreased almost by half between 1992 and 2011, the percentage of homicides committed with firearms has remained approximately the same at 67 percent. *See id.* (highlights section). This means that the number of homicides per 100,000 persons has decreased, although the percentage of those homicides committed with firearms has remained static.

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[6]Available online at http://www.bjs.gov/content/pub/pdf/hus11.pdf

Section 922(g)(9) took effect in 1996. According to records maintained by two organizations, the rate of homicides committed by intimate partners *with firearms* decreased as much between 1980 and 1996 as it did from 1996 to 2008 (decreasing 13 percent before 1996 and 13 percent after 1996). *See* BJS, Patterns & Trends: Homicide Trends in the United States, 1980-2008 Annual Rates for 2009 and 2010 at 17 and figure 25a (Nov. 2011). This statistic implies that the cause of a decrease in intimate partner homicide with firearms was decreasing prior to any prohibition created by § 922(g)(9), and that the rate of decrease has not been materially affected since its enactment. The lack of a demonstrable effect may stem from selecting as predicate a "misdemeanor crime of domestic violence" that does not positively correlate to firearm misuse. Whether the Government can establish the necessary "substantial relationship" does not appear supported by these statistics. It is especially problematic where the Fourth and Seventh Circuits depended on Section 922(g) reaching only misdemeanors involving actual violence in upholding the statute against constitutional challenges. *See Staten*, 666 F.3d, at 162-163; *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)(en banc).

The response to the statistical argument may be: there is still violence against women and it is still an evil that Congress may address through legislation such as Section 922(g)(9). The rebuttal to this response is as follows:

> It is ... laudable that feminists hope to shape a criminal law that embodies values of gender equality and nonviolence. However, equality is a moving target that can be invoked to support various normative goals. If feminists are truly committed to reducing hierarchy and subordination, they should reevaluate whether pursuing the opaque mantle of equality through greater penal severity actually does so. Moreover, the commitment to nonviolence, while unquestionably noble in theory, does not necessarily lead to a world with less suffering. In fact, police, prosecutors, and politicians' efforts to control private violence through the criminal law have arguably constructed a world of acceptable, if not glorified, institutional violence. It is thus time to take a critical look at what the discourse of "violence hath wrought." More importantly, I hope that this Article is part of a larger conversation encouraging progressives—including feminists, humanitarians, and critical race theorists—to be more circumspect about prosecutorial

> solutions to gendered harms and racialized violence. The link between social problems and criminal law solutions is not natural, obvious, or required. It is the product of a larger neoliberal framework that has predicated the decimation of social welfare and our current excess of imprisonment.

Gruber, Aya, *A Provocative Defense*, 103 Calif. L.R. 273, 332-333 (2015). "It isn't necessary to jettison every modicum of a fair process to redress decades-long inattention to these issues. It never is. ... [W]e should not substitute a regime in which women are treated without dignity for one in which those they are accusing are similarly demeaned. Indeed, feminists should be concerned about fair process, not just because it makes fact-findings more reliable and more credible, but for its own sake." Gertner, Nancy, "Sex, Lies and Justice: Can we reconcile the belated attention to rape on campus with due process?" The American Prospect (Jan. 19, 2015).[7] Congress may choose to spend money in order to afford relief to those who experience domestic violence, as well as to analyze its causes and offer programs to promote the cessation of domestic violence. Banning those with misdemeanor convictions from firearm possession does not appear to offer a "substantial means [that] will alleviate the real harms to a material degree." *Rubin*, 514 U.S., at 487

F. The constitutional issues presented merit review

Important issues of constitutional law are implicated in the construction given §§ 921(a)(33)(A) and 922(g)(9) provided in *Hayes, Castleman*, and *Voisine*. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951)(Douglas, J., concurring). Besides the procedural questions, there lurks the underlying substantive issue on

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[7]Available online at http://prospect.org/article/sex-lies-and-justice

Congress's ability to divest large populations of Second Amendment rights, the means the federal government may take to preventing violent crime, and the effectiveness of its efforts to address legitimate concerns. These issues directly affect the convictions obtained against Petitioners. The issues were presented to, and rejected by, the First Circuit. Due to the continuing nature of the issues, review is merited.

II.

THE FIRST CIRCUIT'S DECISION TO INCLUDE MISDEMEANORS WITH THE *MENS REA* OF RECKLESSNESS IN THE DEFINITION OF "USE OF PHYSICAL FORCE" CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THOSE OF TEN OTHER CIRCUITS

Petitioners' statutory argument centers on the proposition that an undifferentiated conviction based on 17-A M.R.S.A. § 207(1)(A) does not meet the definition of a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9) as the Maine statute allows conviction based on a *mens rea* of recklessness. There is no factual basis in either of Petitioners' prior misdemeanor convictions. Reviewing courts are required to consider that the convictions were for the least serious included offense, namely, recklessly causing offensive physical contact. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005). The First Circuit has continuously held that any means of committing a simple assault under Maine law, including by reckless conduct, constitutes a proper § 922(g)(9) predicate. *See United States v. Nason*, 269 F.3d 10 (2001); *United States v. Booker*, 644 F.3d 12,16 (1st Cir. 2011); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013), *rem.* 134 S.Ct. 1759 (2014), *aff'd sub nom. United States v. Voisine*, 778 F.3d 176 (1st Cir. 2015).

Petitioners previously requested this Court to consider whether a prior conviction based on reckless conduct resulting in offensive physical contact can

support a § 922(g)(9) prosecution. The Court remanded these cases to the First Circuit for reconsideration in light of the decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014). *See Armstrong v. United States*, 134 S.Ct. 1759 (2014). The First Circuit adopted the approach of *Castleman* to give the statute a broad interpretation. The initial problem with this analysis is that it conflicts with the actual holding of *Castleman*. A secondary one is that it conflates volition with purposefulness, a separation which courts have recognized as determinative where "use of force" is a statutory phrase. The significance of these conflicts merit review by this Court.

A. The First Circuit's interpretation of "use ... of physical force" conflicts with the decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014)

As stated by this Court, *Castleman* concerned "the meaning of one phrase ... 'the use ... of physical force.'" *Id.*, 134 S.Ct., at 1408. In resolving this issue, the Court held "that Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *Id.*, at 1410. Based on this explicit holding, the parties below agreed that, "under Castleman, the term 'use of physical force' also incorporates the common law *mens rea* for battery." *Voisine*, slip op. at 16, Appx. A. The First Circuit, however, declined "the parties' invitation to define the *mens rea* of a common law battery independent of the interpretation Maine gives its own statute." *Id.*

That a battery is an intentional crime under the common law was settled in *Johnson v. United States*, 559 U.S. 133 (2010). *Johnson* held that it was "unlikely" that Congress meant to incorporate into the definition of a "'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor," *Id.*, at 141. However, because Section 922(g)(9), unlike Section

924(e), targeted misdemeanants rather than felons, *Castleman* held that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' *the type of conduct* that supports a common-law battery conviction." *Castleman*, 134 S.Ct., at 1411 (emphasis added). That "conduct" consists "of the intentional application of unlawful force against the person of another." *Johnson*, 559 U.S., at 139.

In deciding that recklessly causing offensive physical contact qualifies as a § 922(g)(9) predicate, the First Circuit analyzed the definition of "reckless conduct" set forth by statute in Maine. It held that, although Maine law also has a separate definition for intentional conduct, reckless conduct involves a sufficient level of volition pursuant to the Maine definition to render it "intentional enough":

> Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a *mens rea* involving a substantial amount of deliberateness and intent. The statutory definition requires that a person "consciously disregard[] a risk that the person's conduct will cause" the result. Me. Rev. Stat. Ann. tit. 17-A § 35(3)(A) (emphasis added). The disregard of the risk is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person." *Id.* § 35(3)(C) (emphasis added). Further, it must "involve a gross deviation" from the standard of reasonable care.

Voisine, slip op. at 17-18, Appx. A. The question remains whether recklessly causing offensive physical contact and the common law offense of battery are one and the same.

All of the examples the First Circuit gives in interpreting reckless conduct involve causing bodily injury *See id.* at 19-20. It declined to address the issue which this Court squarely placed before it in remanding the case in light of *Castleman*. "The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury. We do not see why that distinction is material to the analysis here." *Voisine*, slip op. at 22. Judge Torruella offered an answer to this distinction in his dissent:

> [T]he Maine statutes at issue here permit[] conviction for far less culpable conduct: merely reckless conduct that is also reckless as to the result of offensive physical contact. In so doing, the majority conflates *mens rea* as to the result with *mens rea* as to the underlying conduct that causes the result. It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does not permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching.

Voisine, slip op. at 34, n.9 (Torruella, J., dissenting)(alterations added).

These distinctions are both relevant and determinative because they are the ones explicitly adopted by this Court when limiting the conduct encompassed in the term "use ... of physical force" to the conduct constituting a common law battery. Given the Court's holding that intentional conduct is required for a common law battery to occur, it would appear appropriate for this Court to grant review to clarify that both elements of a battery offense, the intentional *mens rea* and the *actus reus* of physical contact, must appear as elements in a § 922(g)(9) predicate.

B. The interpretation of the phrase "use ... of physical force" adopted by the First Circuit conflicts with that of ten other circuits

The second reason the Court should grant review of the statutory construction issue is due to the split in the circuits regarding whether reckless conduct can fit within the term "use of force." The First Circuit's decision also conflicts with this Court's rationale for including non-violent conduct within the term "crime of domestic violence." The question regarding whether reckless conduct is sufficient, in the abstract, to satisfy the "use of force" element derives from the observation in *Castleman* that "It does not appear that every type of assault defined by § 39–13–101 necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon,' § 921(a)(33)(A). A threat under § 39–13–101(2) may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury under § 39–13–101(1) may not be a 'use' of force." *Id.*, 134

S.Ct., at 1413-1414. This Court noted the split in the circuits regarding whether recklessly causing bodily injury (as opposed to recklessly causing offensive physical contact) has been ruled *not* to constitute "use ... of physical force" by ten circuits, whereas the issue had not been determined in the First Circuit.[8] *See id.*, n.8.

The First Circuit panel majority focused on the split noted in footnote 8, and reckless conduct as defined in Maine. It sought to limit this decision by noting that it was not determining whether all definitions of recklessness would fall within § 922(g)(9), but "only that the Maine definition is sufficiently volitional that it falls within the definition of 'use of physical force' applied in § 922(g)(9)." *Voisine*, slip op. at 24, Appx. A.

The holding is not a narrow one, as "the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities. Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code." *Voisine*, slip op. at 64 (Torruella, J., dissenting). It is the panel majority's reliance on conduct being volitional, but not purposeful, which creates the tension between it and this Court's rationale in *Castleman*.

In *Castleman*, the Court noted that "the knowing or intentional application of force is a 'use' of force. Castleman is correct that under *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), the word 'use' 'conveys the idea that the

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[8]The First Circuit joined all other circuits in determining that reckless conduct does not constitute a "crime of violence" for purposes of 18 U.S.C. § 16 in *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014), but declined to follow *Fish* for purposes of § 921(a)(33)(A). *Fish* involved construing whether a variety of offenses qualified as "crimes of violence" for purposes of the possession of body armor. *See* 18 U.S.C.§ 931. It determined that offenses committed recklessly did not qualify as necessary predicates. *See Fish*, 758 F.3d at 9-10.

thing used (here, 'physical force') has been made the user's instrument.'" *Id.*, 134 S.Ct., at 1415. Even though "[m]inor uses of force may not constitute 'violence' in the generic sense ... an act of this nature is easy to describe as 'domestic violence,' when the accumulation of such acts over time can subject one intimate partner to the other's control." *Id.*, at 1412 (alteration added). The idea of "control" underlies the Court's adoption of non-violent contact as qualifying as "domestic violence." The same idea of "control" led other circuits to exclude crimes with the *mens rea* of recklessness from the term "use of force."

For instance, in *Jobson v. Ashcroft*, 326 F.3d 367 (2nd Cir. 2003), the Court considered whether a prior conviction for manslaughter in the second degree, which contained a *mens rea* of reckless conduct, *see id.*, at 372, could be a crime of violence under 18 U.S.C. § 16(b). The definition of recklessness at issue in *Jobson* is virtually identical to Maine's definition. *See id.* In determining that a defendant who is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists," *id.*, at 372 n.4, does not meet the definition of the federal statute, the Second Circuit reasoned that the "risk of serious physical injury concerns the likely effect of the defendant's conduct, but the risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end." *Id.*, at 373.

The Fourth Circuit adopted the "as a means to an end" analysis in *Garcia v. Gonzales*, 445 F.3d 465 (4th Cir. 2006). There, the Court considered whether a conviction for reckless assault in the second degree, *see* N.Y. Penal Law § 120.05(4), constituted an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F), which requires a crime meet the definition of 18 U.S.C. § 16. In concluding that the prior conviction did not qualify, the Fourth Circuit emphasized that it is not sufficient that physical force occur, but that any such force must be used "as a means to an

end." *Id.*, 445 F.3d, at 469. Although both *Jobson* and *Garcia* involved § 16(b), the Court in *United States v. Portela*, 469 F.3d 496, 499 n.1 (6th Cir. 2006) noted that *Leocal* held both parts of § 16 to encompass the same *mens rea*. *See also Oyebanji v. Gonzales*, 418 F.3d 260, 263 (3rd Cir. 2005).

Not all courts have adopted the "means to an end" test. Some simply look at the level of *mens rea* and have decided that reckless conduct does not involve the level of intent implicated by the phrase "use of force." For instance, the Third Circuit reasoned that because "Oyebanji's crime, although plainly regarded by New Jersey as involving a substantial degree of moral culpability, did not involve the intentional use of force but instead required only recklessness," the Court held that a crime committed recklessly does not qualify as a "crime of violence." *Id.*, 418 F.3d, at 264. The definition of reckless conduct mirrors that adopted in Maine. *See id.*, at 263, n.4.

The Ninth Circuit, in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006)(en banc) decided that a recklessly committed domestic violence assault did not qualify as a § 16 crime of violence. The definition of recklessness is similar to that in Maine. *See id.*, at 1130. The Court rejected "volitional" as the test for "use of force," but indicated that the dictionary definition of "accidental" (that level of intent specifically rejected in *Leocal*) indicates non-purposeful conduct. Reckless conduct is generally defined as non-purposeful as to result, and therefore fits the definition of "accidental." *See id.*, at 1129-1130. *See also United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008)(most reckless crimes are non-purposeful); *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007)(reckless manslaughter not a crime of violence after *Leocal*); *United States v. Zuñiga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008)(reckless conduct is the equivalent of accidental conduct and fails to

satisfy either prong of § 16); *United States v. Palomino-Garcia*, 606 F.3d 1317, 1335-1336 (11th Cir. 2010).

Given the rationale provided in *Castleman* that a non-violent offense may be used to exert control over a domestic partner, it would seem natural that "control" involves intentional, rather than reckless, conduct. It is difficult to say that a person recklessly exerts control over another, but more natural to say one intentionally does so. Although this Court has indicated that it wishes to have § 922(g)(9) apply as broadly as possible, the statute must have limits. The question, as noted in *Castleman*, involves a split in the circuits that will affect the application of § 922(g)(9) nationally Hence, this is a question ripe for review.

CONCLUSION

The instant petition presents important and far-reaching statutory and constitutional issues. These issues have long split the Courts of Appeals and have created conflict within the decisions of this Court. Both Petitioners have federal felony convictions that could not be upheld if the level of intent required for a common-law offensive contact infraction applied to their convictions. Neither could they be sustained if they had been afforded constitutionally mandated procedural and substantive protections. For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Dated: June 4, 2015

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Appendix A: *United States v. Voisine and Armstrong*, First Cir. Nos. 12-1213 and 12-1216 (Jan. 30, 2015) decision of the First Circuit and Errata

Appendix B: *United States v. Voisine and Armstrong*, First Cir. Nos. 12-1213 and 12-1216, denial of rehearing and rehearing en banc

Appendix C: Ltr from FBI to Stephen Smith, Esq. dated August 13, 2013

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon John A. Woodcock, U.S. District Judge]

Before

Lynch, Chief Judge,
Torruella and Stahl, Circuit Judges.

Virginia G. Villa, Assistant Federal Defender, Federal Defender Office, for appellants

Renée M. Bunker, Assistant United States Attorney, with whom Thomas E. Delahanty II, United States Attorney, was on brief, for appellee

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January 30, 2015

LYNCH, **Chief Judge**. The Supreme Court has directed us, in light of United States v Castleman, 134 S Ct 1405 (2014), to consider again our decision in these two cases that both defendants had indeed been convicted under state law of "misdemeanor crimes of domestic violence," as defined in 18 U S.C § 921(a)(33)(A), even though the state statutes allowed conviction based on a recklessness mens rea Armstrong v United States, 134 S Ct 1759 (2014) (Mem.); see United States v Armstrong, 706 F 3d 1 (1st Cir 2013); United States v Voisine, 495 F App'x 101 (1st Cir 2013) (per curiam) If so, then their motions to dismiss their federal charges for possessing firearms after such convictions, in violation of 18 U S.C § 922(g)(9), were properly denied

Our answer is informed by congressional recognition in § 922(g)(9) of the special risks posed by firearm possession by domestic abusers "Domestic violence often escalates in severity over time and the presence of a firearm increases the likelihood that it will escalate to homicide " Castleman, 134 S Ct at 1408 It is also informed by the congressional choice in the federal sentencing scheme to honor each state's choice as to how to define its own crimes, through statutory text and judicial decision

As we see it, this case turns on the unique nature of § 922(g)(9) That section is meant to ensure that individuals who engage in the "seemingly minor act[s]" that actually constitute

domestic violence, like squeezing and shoving, may not possess a firearm. Castleman, 134 S. Ct at 1412 This range of predicate acts is broader than that found in other federal prohibitions involving the use of physical force Applying the teachings of Castleman, we find that Maine's definition of reckless assault fits within § 922(g)(9)

We affirm the denial of the motion to dismiss the indictment and information here That means the conditional guilty pleas the defendants entered are valid and their sentences stand. The question is close and we rule narrowly

I

A. Statutory Background

As the Supreme Court observed in Castleman, 18 U S.C § 922(g)(9) was enacted to close a loophole "While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors " Castleman, 134 S Ct at 1409 No ban prevented those domestic abusers from possessing firearms, yet there is a "sobering" connection between domestic violence and homicide Id. The "manifest purpose" of § 922(g)(9), the Lautenberg Amendment to the Gun Control Act of 1968, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife " United States v Hayes, 555 U S 415, 426-27 (2009)

Under § 922(g)(9), it is against federal law for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition " In turn, a "misdemeanor crime of domestic violence" is defined in § 921(a)(33)(A) as an offense that (1) is a misdemeanor under federal, state, or tribal law, and (2) "has, as an element, the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim" or by a person in a similar domestic relationship with the victim.

The predicate offenses in these cases are convictions under Maine assault statutes Me Rev Stat Ann tit 17-A, §§ 207(1)(A), 207-A(1)(A) Under Maine law, a "person is guilty of assault if[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person " Id. § 207(1)(A) A violation of § 207 constitutes misdemeanor domestic violence assault if the "victim is a family or household member " Id. § 207-A(1)(A)

Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Id. § 35(3)(A) The statute goes on to give more meat to the "conscious disregard" definition It refers to disregard of a risk, "when viewed in light of the nature and

purpose of the person's conduct and the circumstances known to that person," that "involve[s] a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C)

B. Facts

William E Armstrong III was convicted in 2002 and 2008 of assaulting his wife in violation of Maine's misdemeanor assault statutes, Me Rev Stat Ann tit 17-A §§ 207(1)(A), 207-A(1)(A) In May 2010, twenty-nine months after the last domestic assault conviction, the Maine State Police searched the Armstrong residence for drug paraphernalia and marijuana. They discovered six firearms and ammunition. The police notified the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which executed a search That search uncovered only ammunition, but Armstrong later explained that he had arranged for a friend to remove the guns ATF agents observed the guns at the friend's home

Armstrong was arrested and federally charged with being a prohibited person in possession of a firearm, in violation of § 922(g)(9) The indictment listed Armstrong's 2008 domestic violence assault conviction as the predicate offense

Stephen L. Voisine was convicted in 2003 and 2005 of assaulting a woman with whom he was in a domestic relationship, in violation of Maine's assault statute In 2009, acting on an

anonymous tip, state and local law enforcement officials arrested Voisine on the federal misdemeanor charge of killing a bald eagle in violation of 16 U S.C. § 668(a) When conducting a background check, they discovered his 2003 misdemeanor simple assault As Voisine had turned a rifle over to the police during the investigation, the criminal information charged him with violating § 922(g)(9) as well as § 668(a)

C Procedural History

Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision [1]

We consolidated Armstrong and Voisine's cases In a January 18, 2013 opinion, we affirmed the district court's decisions Armstrong, 706 F 3d at 1; see Voisine, 495 F App'x. at 102 (incorporating the reasoning from Armstrong as there were "no pertinent factual differences" distinguishing the two cases) The defendants had argued that a misdemeanor assault on the basis of

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[1] In February 2012, Armstrong was sentenced to three years of probation and a fine and special assessment totaling $2,600 Also in February 2012, Voisine was sentenced to a year and a day imprisonment on the § 922(g)(9) charge with two years supervised release, concurrent with nine months imprisonment and one year supervised release on the § 668(a) charge, and $125 in special assessments

offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence " Relying on United States v Booker, 644 F 3d 12 (1st Cir 2011), and United States v Nason, 269 F 3d 10 (1st Cir 2001), we held that § 922(g)(9) did not distinguish between violent and nonviolent convictions, and the statute included the offensive physical contact portion of the Maine statute within its definition of "physical force " Armstrong, 706 F 3d at 6; Voisine, 495 F App'x at 101-02

Second, the defendants argued that § 922(g)(9) violated the Second Amendment as applied to them This argument was foreclosed by Booker, which denied an identical argument framed as a facial challenge 644 F 3d at 22-26; see Armstrong, 706 F 3d at 7-8; Voisine, 495 F App'x at 101

The defendants petitioned for certiorari On March 31, 2014, the Supreme Court granted their petitions, vacated the judgments, and remanded "for further consideration in light of United States v Castleman." Armstrong v United States, 134 S Ct 1759 (2014) (Mem.) In Castleman, the Court had addressed the issue of whether the phrase "use of physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching That issue had been the source of a circuit split Castleman resolved the question in agreement with Nason, holding that "Congress incorporated the common-law meaning of

'force' -- namely, offensive touching -- in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence '" Castleman, 134 S Ct at 1410 The Supreme Court left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate Id. at 1414 In footnote 8, the Court stated, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," and listed ten cases [2] Id. at 1414 n 8 It then added, "But see United States v Booker, 644 F 3d 12, 19-20 (C.A.1 2011) " Id. The footnote did not say Booker was wrong It gave no further definition of recklessness Nor did it account for the differences in the statutory sections being interpreted in the other cases cited.

This case comes to us following the Supreme Court's remand

II

In construing § 922(g)(9)'s applicability to a given case, we use the "categorical approach " Under that approach the

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[2] United States v Palomino Garcia, 606 F 3d 1317, 1335-36 (11th Cir 2010); Jimenez-Gonzalez v Mukasey, 548 F 3d 557, 560 (7th Cir 2008); United States v Zuniga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008); United States v Torres-Villalobos, 487 F 3d 607, 615-16 (8th Cir 2007); United States v Portela, 469 F 3d 496, 499 (6th Cir 2006); Fernandez-Ruiz v Gonzales, 466 F 3d 1121, 1127-32 (9th Cir 2006) (en banc); Garcia v Gonzales, 455 F 3d 465, 468-69 (4th Cir 2006); Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005) (Alito, J); Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926 (5th Cir 2001)

elements of the predicate offense (here, the Maine assault statute) must be identical to or categorically within the description of the subsequent provision (here, § 922(g)(9)) See Castleman, 134 S Ct at 1413 Where, as here, the predicate statute is "divisible" into crimes with alternative sets of elements, we may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the "modified categorical approach " Id. at 1414 The government concedes that the record here of the state proceedings is too sparse to "discern under which prong of Maine's statute" the defendants were convicted, and they urge us against "resort[ing] to the modified categorical approach." For us to affirm, we must find that the Maine statute -- including the reckless acts it prohibits -- categorically fits within § 922(g)(9)

The defendants frame the issue as whether a reckless act can constitute a "use of physical force" and rely on cases interpreting statutes other than § 922(g)(9) We do not agree that is the proper way to frame the question That framing is predicated on the notion that particular statutory language must be interpreted identically in different sections across the U S Code. To the contrary, context matters, as the Supreme Court demonstrated in Castleman itself 134 S Ct. at 1410-12 The question is whether Maine's definition of recklessness fits within § 921(a)(33)(A)'s phrase "use of physical force "

Section 921(a)(33)(A) is a provision crafted in the unique context of domestic violence, and it should be so interpreted. Castleman, 134 S Ct at 1410-12 & n 4; Booker, 644 F 3d at 18-21

This reframing of the question clarifies our approach to the two arguments raised by the defendants: that Castleman footnote 8 decides this case, and that Castleman's analysis of § 921(a)(33)(A) undermines our prior decisions Castleman's emphasis on context reinforces, rather than undermines, our earlier decision

A. Castleman Footnote 8

The defendants read too much into Castleman footnote 8, which expressly does not resolve the question before us Nor is their argument made by reference to the cases cited for contrast in

the footnote Each of those cases[3] construes a different statutory definition, and all but one arose in a different context

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[3] All but one of the ten cases cited in Castleman footnote 8 as deciding the § 922(g)(9) mens rea issue in fact considered other statutes in other contexts and followed the reasoning of Leocal v Ashcroft, 543 U S 1, 13 (2004) Six cases analyzed 18 U S C § 16 In Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005) (Alito, J), the Third Circuit read Leocal to apply to § 16(b), which offered an alternative definition of "crime of violence" to § 16(a), and decided that reckless crimes cannot be crimes of violence under that section Three other cases from the footnote did the same See Garcia v Gonzales, 455 F 3d 465, 467-69 (4th Cir 2006) (interpreting § 16(b), as referenced in an immigration statute); Jimenez-Gonzalez v Mukasey, 548 F 3d 557, 559-62 (7th Cir 2008) (same); United States v Torres-Villalobos, 487 F 3d 607, 614-17 (8th Cir 2007) (same) Two more interpreted the same provision, but without relying on Leocal, which had yet to be decided. See Jobson v Ashcroft, 326 F 3d 367, 373-74 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926-27 (5th Cir 2001) All of these cases interpreted the term "crime of violence" as part of an aggravated felony statute, and Castleman is clear that the interpretive rules governing felonies do not apply to misdemeanor crimes of domestic violence. 134 S Ct at 1411

Three of the remaining four cases interpreted the term "use of physical force" in the context of a Sentencing Guidelines provision imposing an enhancement for defendants who were deported after committing a felony "crime of violence," U S Sentencing Guidelines Manual § 2L1 2(b)(1)(A) Each of those cases analyzed the provision by analogizing to § 16 and applying Leocal. For example, in United States v Palomino Garcia, the Eleventh Circuit explained that both § 16 and the Guidelines provision define the phrase "crime of violence," and they are "almost identically worded." 606 F 3d 1317, 1335 (11th Cir 2010) It then cited Leocal and the other § 16 cases mentioned above to conclude that a "use of physical force" cannot be reckless Id. at 1335-36; see also United States v Portela, 469 F 3d 496, 498-99 (6th Cir 2006); United States v Zuniga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008)

Even if § 16 were analogous to § 922(g)(9), that would not resolve the matter The Third Circuit has explained that some reckless convictions can serve as predicates for § 16 offenses, depending on the nature of the recklessness Aguilar v Att'y Gen., 663 F 3d 692, 698-700 (3d Cir 2011); cf. United States v Espinoza, 733 F 3d 568, 572-74 (5th Cir 2013) (allowing a reckless conviction to be a predicate for a violent felony under the Armed Career Criminal Act)

Footnote 8 begins by describing the issue as an open question, with a citation to Leocal v Ashcroft, 543 U S 1, 13 (2004) In Leocal, the Supreme Court interpreted 18 U S C § 16(a), the definition of the term "crime of violence " 543 U.S at 8-10 Such a crime requires "use of physical force," and Leocal held that the term "use" suggests a mens rea higher than negligence, but it withheld judgment on whether recklessness is sufficient, Castleman, 134 S Ct at 1414 n 8; Booker, 644 F 3d at 19-20

Considering context, section 16(a) is not analogous to the section which concerns us, § 922(g)(9) Castleman itself distinguished the term "use of force" in § 16(a), a provision for undifferentiated violent crimes, from the term "use of physical force" in § 922(g)(9)'s domestic violence provision "Domestic violence" is a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter," including "acts that might not constitute 'violence' in a nondomestic context " Castleman, 134 S Ct at 1411 & n 4 A "crime of violence," by contrast, "suggests a category of violent, active crimes " Id. at 1411 n 4 (quoting Leocal, 559 U S at 140) (internal quotation mark omitted) As the Supreme Court explained, a "'squeeze of the arm [that] causes a bruise'" is "hard to describe as 'violence'" within the meaning of § 16, but "easy to describe as 'domestic violence'" within the meaning of

§ 922(g)(9) Id. at 1412 (alterations in original) (quoting Flores v Ashcroft, 350 F 3d 666, 670 (7th Cir 2003)) (internal quotation marks omitted)

Unsurprisingly, the drafting history of § 922(g)(9) indicates that "Congress expressly rejected" the § 16(a) definition, instead developing the term "misdemeanor crime of violence" that was "'probably broader' than the definition" in § 16 Booker, 644 F 3d at 19 (citing a statement by Sen Lautenberg) And where Congress wanted to define a domestic violence crime as a § 16 crime of violence occurring in the domestic context, it has done so -- even in the same legislation that contained the Lautenberg Amendment See, e.g., 8 U S C § 1227(a)(2)(E) "That it did not do so here suggests, if anything, that it did not mean to." Castleman, 134 S Ct at 1412 n 6

The only case cited in Castleman footnote 8 from the domestic violence context is one in which Congress elected to define the crime with reference to § 16 In Fernandez-Ruiz v Gonzales, the Ninth Circuit considered whether a reckless misdemeanor could serve as a predicate "crime of domestic violence " 466 F 3d 1121, 1124 (9th Cir 2006) (en banc) (citing 8 U S.C. § 1227(a)(2)(E)(i)) Unlike § 922(g)(9), however, the relevant statute in Fernandez-Ruiz defined "crime of domestic violence" as a "crime of violence" (referencing § 16) committed

against someone in a domestic relationship with the perpetrator Id. at 1124-25 The Ninth Circuit accordingly conducted a § 16 analysis, applying Leocal and cases from other circuits to reach its conclusion Id. at 1127-32 But even that result did not follow so obviously from Leocal, as four judges dissented emphasizing the differences between domestic violence and other contexts Id. at 1136 (Wardlaw, J , dissenting)

On remand of this case to us, the defendants' brief adds to the cases in the footnote by citing two other § 922(g)(9) cases, not mentioned in Castleman, which they say directly conflict with Booker We disagree In United States v White, 258 F 3d 374 (5th Cir 2001), the relevant predicate statute criminalized reckless "conduct that places another in imminent danger of serious bodily injury " Id. at 381 The court found that the statute did not require a completed "use of physical force," since it was satisfied by a risk of injury, and the statute extended beyond an "attempted use of force" because attempt liability requires specific intent rather than recklessness Id. at 382-84 Rather than construing the phrase "use of physical force," as Booker did, White relied on principles of attempt liability to rule out reckless predicate crimes

In United States v Howell, 531 F 3d 621 (8th Cir 2008), also added by the defendants, the predicate statute criminalized reckless "conduct which creates a grave risk of death or serious

physical injury to another ". Id. at 624 The court found this provision to be a "catch-all provision applicable to innumerable factual situations," so a completed "use of physical force" is not always or ordinarily present Id.

Simply put, we are aware of no case -- including the cases in Castleman footnote 8 -- in conflict with Booker's holding that a reckless misdemeanor assault satisfies § 922(g)(9)'s particular definition of a "misdemeanor crime of domestic violence " Rather, § 922(g)(9)'s unique context, as described in Castleman and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly than other provisions, including § 16.

B. Structure of Castleman

The defendants present a second argument, which is that Castleman's analytical approach to the term "use of physical force" means the conduct of neither defendant here could meet that standard. Castleman held that Congress intended to incorporate the common law meaning of "force" in § 921(a)(33)(A), the definitional provision for "misdemeanor crime of domestic violence " 134 S Ct at 1410 "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common law terms it uses '" Id. (quoting Sekhar v United States, 133 S. Ct 2720, 2724 (2013)) (internal quotation mark omitted) As a result, the

statutory term "physical force" is satisfied by "the degree of force that supports a common-law battery conviction " Id. at 1413 The parties agree that, under Castleman, the term "use of physical force" also incorporates the common law mens rea for battery

The parties approach this as a generalized question They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view See, e.g., Johnson v United States, 559 U S 133, 139 (2010); Lynch v Commonwealth, 109 S E 427, 428 (Va 1921); Commonwealth v Hawkins, 32 N.E. 862, 863 (Mass 1893); 2 Wayne R. LaFave, Substantive Criminal Law § 16 2(c)(2); 3 William Blackstone, Commentaries *120

We decline the parties' invitation to define the mens rea of a common law battery independent of the interpretation Maine gives its own statute Castleman explains that the term "use of physical force" includes "the type of conduct that supports a common-law battery conviction." 134 S Ct at 1411 Castleman also explains that Congress incorporated "the common-law meaning of 'force '" Id. at 1410 Castleman holds that the term "use of physical force" includes both causing bodily injury and offensive contact Defendants concede that reckless causation of bodily injury is a use of physical force We see no reasoned argument that offensive physical contact does not similarly entail the use

of force simply because it is inflicted recklessly as opposed to intentionally

We follow the statutory scheme in evaluating whether a conviction under the Maine statute categorically counts as a "misdemeanor crime of domestic violence "

1 The Scope of a "Misdemeanor Crime of Domestic Violence"

As Castleman explained, § 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms 134 S Ct at 1408-12 "[B]ecause perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" id. at 1411 (quoting Hayes, 555 U S at 427), we think Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes See id. at 1411, 1413 That encompasses assault statutes for those states that allow conviction with a mens rea of recklessness where recklessness is defined as including a degree of intentionality A victim of domestic violence often encounters the perpetrator again, and a broader reading of § 922(g)(9)'s mens rea requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault If Congress had wanted to impose a higher mens rea, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9) Booker, 644 F 3d at 18 & n 5

This view is confirmed by the legislative history of § 922(g)(9) Senator Lautenberg explained that § 922(g)(9) was a broad prohibition covering "any person convicted of domestic violence," without reference to a particular mental state 142 Cong Rec S10377-01 (1996) Another senator made statements to the same effect See id. Additionally, Senator Lautenberg described the law's application to scenarios without clear intent, in which domestic arguments "get out of control," "the anger will get physical," and one partner will commit assault "almost without knowing what he is doing " 142 Cong Rec S11872-01 (Sept 30, 1996) Such conduct may not be "knowing," but it nonetheless constitutes a "use" of physical force -- whether it causes offensive contact or bodily harm.

2 Maine's Definition of "Recklessness"

Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent The statutory definition requires that a person "consciously disregard[] a risk that the person's conduct will cause" the result Me Rev Stat Ann. tit 17-A § 35(3)(A) (emphasis added) The disregard of the risk is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person " Id. § 35(3)(C) (emphasis added) Further, it must

"involve a gross deviation" from the standard of reasonable care Id.

Maine's definition of "recklessly," like its definition of "knowingly," includes an element of intentionality and specificity To act "knowingly" in Maine, the person must be aware that the result is "practically certain" to occur Id. § 35(2)(a) Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur Cf. 2 LaFave, Substantive Criminal Law, § 5 4(f) To act knowingly and recklessly, but not negligently, the person must be aware of the risk: the recklessness definition requires reference to "the nature and purpose of the person's conduct and the circumstances known to the person " Maine's Supreme Judicial Court has made clear that the recklessness inquiry focuses on the person's "subjective state of mind." Stein v Me. Criminal Justice Acad., 95 A.3d 612, 618 (Me 2014) (quoting State v Goodall, 407 A.2d 268, 280 (Me 1979)) (internal quotation mark omitted); see State v Hicks, 495 A.2d 765, 771 (Me 1985) (comparing the subjective test for recklessness with the objective test for negligence)

For example, the Maine Supreme Judicial Court has affirmed a conviction for "act[ing] recklessly when [the defendant] shot a powerful handgun into the woods in a residential area and in the direction of his next-door neighbor's home, knowing where it

was located " State v Kline, 66 A 3d 581, 584 (Me 2013) (citing Me Rev Stat Ann. tit 17-A § 35) It also affirmed a conviction for reckless conduct with the use of a dangerous weapon when the defendant "drove his van alongside the victim's vehicle, remaining there [,] used his van to push the victim's vehicle into heavy oncoming traffic, and made contact with that vehicle at least once " State v York, 899 A.2d 780, 783 (Me. 2006)

Maine's definition of recklessness includes a volitional component In this, it is like other states See Fernandez-Ruiz, 466 F 3d at 1141 (Wardlaw, J , dissenting) (collecting cases) Notwithstanding Leocal, some judges found that even § 16 encompassed reckless predicate convictions In Fernandez-Ruiz, four dissenting judges of the Ninth Circuit observed that Arizona's definition of recklessness, like Maine's, requires that the person "be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that risk." Id. Recklessness includes an "volitional, active decision, which necessarily involves 'a higher degree of intent than negligent or merely accidental conduct '" Id. (quoting Leocal, 543 U S at 9); accord Bejarano-Urrutia v Gonzales, 413 F 3d 444, 449-50 (4th Cir 2005) (Niemeyer, J , dissenting) ("Unlike a person who accidentally injures another person, a person who acts recklessly in bringing about harm to another is aware of the nature of his conduct and thus can be said to be 'actively employ[ing]' the physical force

that results in injury 'against another '" (alteration in original) (quoting Leocal, 543 U S at 9))

3 Categorical Comparison

We conclude that reckless assault in Maine is "use of physical force" within the meaning of a "misdemeanor crime of domestic violence " As noted above, § 922(g)(9) is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances This often constitutes domestic violence Reckless assaults in Maine fit that congressional intent for § 922(g)(9), including the paradigm of a domestic assault as described by Senator Lautenberg As the dissenting judges on the Ninth Circuit, concerned with a different federal statute, explained:

> "Domestic abusers may be drunk or otherwise incapacitated when they commit their crimes, and they may plea bargain down from a felony to a misdemeanor or from a statute that requires a mens rea of intentionality to one that can be satisfied by recklessness But this does not alter the nature of domestic violence as a crime involving the use of force against someone in a domestic relationship "

Fernandez-Ruiz, 466 F 3d at 1139 (Wardlaw, J , dissenting)

Defendants' position assumes that a reckless act cannot be an act of domestic violence because it lacks volition But that is not true For example, suppose Maine convicts a husband for throwing a knife toward his wife, intending to instill fear rather

than to cause physical injury, but actually striking her The mens rea of the conviction would likely be recklessness: in light of the circumstances known to the husband, he consciously disregarded the risk of harm. Such a reckless assault can "subject one intimate partner to the other's control," Castleman, 134 S Ct at 1411, and is the type of conduct included in § 922(g)(9) even though the husband did not intend to cause bodily injury or offensive contact. Similarly, if Maine prosecutes and convicts a parent for assault for waving a lit cigarette near a child in anger, the cigarette touching and burning the child, that conviction in context may well be an act of domestic violence

The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury We do not see why that distinction is material to the analysis here The issue is whether § 922(g)(9) encompasses reckless uses of force, regardless of whether the use of force results in bodily injury or an offensive physical contact If the husband's knife grazes his wife or harms her grievously, it is an assault all the same [4]

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[4] The dissent wrongly relies on our decision in United States v Bayes, 210 F 3d 64 (1st Cir 2000), for the proposition the federal assault statute requires deliberate action Id. at 69 (citing 18 U S.C. § 113(a)(5)) Bayes says that "it is sufficient to show the defendant deliberately touched another in a patently offensive manner without justification or excuse " Id. In deciding that the statue did not require specific intent, Bayes did not pass on whether recklessness would satisfy the statute Further, the dissent relies on the rule of lenity, an argument not

As a practical matter, it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate See James v United States, 550 U S. 192, 208 (2007) (explaining that the categorical approach focuses on "the ordinary case," not "every conceivable factual offense covered by a statute"); United States v Fish, 758 F 3d 1, 6 (1st Cir 2014) ("[I]n assessing whether the elements of the candidate proposed as a predicate crime are overbroad, we need not consider fanciful, hypothetical scenarios ") Maine will not prosecute all "[m]inor uses of force " Castleman, 134 S Ct at 1412; see Flores v Ashcroft, 350 F 3d 666, 672 (7th Cir 2003) (Evans, J , concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims [The defendant] actually beat his wife ") But some grabbing and slapping "accumulat[es] over time," "subject[ing] one intimate partner to the other's control " Castleman, 134 S Ct at 1412 When it eventually "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence '" Id. After all, not all assaults will serve as

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made by the defendants

§ 922(g)(9) predicates, but only those occurring in the domestic context

To be clear, we do not decide that, on the spectrum from negligence to intentional acts, recklessness is always closer to the latter Cf. Fernandez-Ruiz, 466 F 3d at 1141-42 (Wardlaw, J , dissenting) ("Recklessness is a distinct mens rea, which lies closer to intentionality than to negligence ") We also do not decide that recklessness in the abstract is always enough to satisfy § 922(g)(9) [5] We decide only that the Maine definition is sufficiently volitional that it falls within the definition of "use of physical force" applied in § 922(g)(9) See Booker, 644 F 3d at 18

C. Our Recent Decision in Carter Does Not Help the Defendants

In United States v Carter, 752 F 3d 8 (1st Cir 2014), we encountered similar facts to this case We remanded for the district court to determine whether the defendant had indeed been convicted of a reckless assault The opinion noted that Castleman "casts doubt" upon Booker, but it explicitly did "not decide" the

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[5] As recognized at 2 LaFave, Substantive Criminal Law, § 5 4 n.6, "usage of the term [recklessness] has not been consistent " See, e.g., United States v Meeks, 664 F 3d 1067, 1070-71 & n.2 (6th Cir 2012) (explaining that "recklessness" in Kentucky is a lower standard than "being aware of and consciously disregarding a substantial and unjustifiable risk") As the dissent observes, while the Model Penal Code definition is similar to Maine's (though not identical), Puerto Rico's definition--until the new statute is in effect--has language quite different from the Maine statute

question before this court Id. at 18 & n 11 Now, squarely presented with the issue and having reviewed Castleman, we resolve the question left open by Carter

III

The defendants make three constitutional arguments, none of which are successful

First, the defendants renew their prior argument that § 922(g)(9) violates the Second Amendment as applied to them. They explicitly raise the argument only to preserve it, and for good reason: it is "foreclosed by binding precedent in this circuit " Carter, 752 F 3d at 13; see Armstrong, 706 F 3d at 7-8; Booker, 644 F 3d at 22-26

Second, the defendants offer a "gloss" on their earlier argument They suggest that Castleman held that the link between non-violent misdemeanors and domestic violence involving firearms is extremely tenuous, and they argue that such a tenuous link cannot support the law's constitutionality To the contrary, Castleman explained that the link between non-violent misdemeanors and domestic violence involving firearms is "sobering," and hardly tenuous 134 S Ct at 1409.

The defendants also raise an argument outside the scope of the Supreme Court's remand. They claim that § 922(g)(9) violates the Fifth Amendment, Sixth Amendment, and Ex Post Facto

Clause because the determination that the predicate crime involves domestic violence is made at the time of the § 922(g)(9) conviction, rather than at the time of the predicate conviction

We have discretion to reexamine issues beyond the scope of the Supreme Court's specific remand order when "necessary to avoid extreme injustice " United States v Burnette, 423 F 3d 22, 25 n 6 (1st Cir 2005) (quoting United States v Estevez, 419 F 3d 77, 82 (1st Cir 2005)) (internal quotation mark omitted) But "[t]here is no injustice in refusing to reexamine a carefully considered decision based on the same arguments that we have already rejected." Id. at 25 n 6 The Supreme Court has already rejected arguments very similar to the defendants' in United States v Hayes, 555 U S 415, 421 (2009)

The defendants argue that Hayes was implicitly overruled by a recent Supreme Court decision, Descamps v United States, 133 S Ct 2276 (2013) Hayes held that the determination that an earlier conviction involved a domestic relationship is an element of § 922(g)(9), not the predicate conviction 555 U S at 418 Descamps limited the extent to which courts can look at the facts underlying the predicate conviction to determine whether they fit the subsequent conviction, under the modified categorical approach 133 S Ct at 2281-82 The defendants argue that, as in Descamps, the subsequent court may not evaluate the predicate conviction to

determine a fact about it -- here, whether it involved a domestic relationship

We reject this argument Whether the predicate conviction involved a domestic relationship is not a fact about the predicate conviction discerned through application of the modified categorical approach, in violation of Descamps It is an element proved anew in the § 922(g)(9) proceeding

IV

The question before us is a narrow one We are asked to decide whether a conviction for reckless assault against a person in a domestic relationship in Maine constitutes a federal "misdemeanor crime of domestic violence " Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts Castleman recognizes as much

For the reasons stated above, we affirm the judgments of guilt

So ordered.

-Dissenting Opinion Follows-

TORRUELLA, Circuit Judge, Dissenting The majority fails to adequately justify its departure from the Supreme Court's direction and the analogous decisions of our sister circuits Indeed, the Supreme Court's message is clear In United States v Castleman, 134 S Ct 1405 (2014), the Court noted that we are the only outlying circuit on this question: our prior precedent is inconsistent with every other circuit court to consider the issue See id. at 1414 n 8 (contrasting our past position with that of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, which have "uniformly held that recklessness is not sufficient" to "constitute a 'use' of force") The Court then remanded the instant cases for reconsideration in light of Castleman, see United States v Armstrong, 134 S Ct 1759 (2014), implicitly suggesting that we bring our holdings in line with the other federal circuit courts of appeals We are obligated to heed the Supreme Court's direction See McCoy v Mass. Inst. of Tech., 950 F 2d 13, 19 (1st Cir 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement ") Not only are the Supreme Court's instructions mandatory, but the legal reasoning and analysis in the cases cited by the Court are also correct

On remand, this case requires us to answer, at the very least, one question of statutory interpretation: whether a Maine conviction for the "reckless" causation of an "offensive physical contact" necessarily involves the "use or attempted use of physical force" as required to establish a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9). The majority fails to persuasively explain why, in all cases, the merely reckless causation of offensive physical contact categorically must involve the "use or attempted use of physical force," 18 U.S.C. § 921(a)(33)(A), particularly in light of the host of cases strongly suggesting otherwise. As explained herein, these cases hold that the "use" of physical force requires the active or intentional employment of force, which cannot be satisfied by merely reckless conduct.

Confronting this question, we are not acting upon an empty stage; rather, we must start with the backdrop painted by the Supreme Court in Castleman, which is the basis for the instant remand. Indeed, the Castleman Court questioned whether the "merely reckless causation" of even bodily injury -- much less offensive physical contact -- could constitute the "use" of force, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," because the "use" of force requires a greater degree of intentionality. Castleman, 134 S. Ct. at 1414 & n.8.

Although the majority opinion correctly observes that those circuit court cases involved different statutes, the operative language is nearly identical and the majority fails to persuasively explain why the result should be different here All of the analogous cases involved the "use" of "force," and most interpreted 18 U S C § 16 See id. at 1414 n 8 (listing cases) Several of these cases[6] analyzed § 16(a), which defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another " 18 U S.C § 16(a) That language is materially indistinguishable, as relevant here, from the Lautenberg Amendment's definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force " 18 U S.C § 922(g)(9); id. § 921(a)(33)(A) "[W]hen Congress uses the same language in two statutes having similar purposes, it is appropriate to presume that Congress intended that text to have the same meaning

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[6] See United States v Torres-Villalobos, 487 F 3d 607, 616-17 (8th Cir 2007) (holding that Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force, and therefore is not a crime of violence under § 16(a)); Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1123 (9th Cir 2006) (holding that reckless conduct cannot constitute the "use" of force for purposes of § 16(a)); García v Gonzales, 455 F 3d 465, 468 (4th Cir 2006) (reasoning that the "use" of "physical force" requires the intentional employment of physical force, and therefore holding that a New York second-degree reckless assault conviction is "beyond the scope" of § 16(a))

in both statutes " Smith v City of Jackson, Miss., 544 U S 228, 233 (2005) [7]

The majority opinion concedes that this case presents a "close" question Ante, at 3 I agree Given the Supreme Court and circuit court cases interpreting similar statutes and holding that merely reckless conduct is insufficient to constitute the "use" of physical force, I believe that the rule of lenity also forecloses the defendants' convictions here Indeed, it is a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" towards the accused. Skilling v United States, 561 U S 358, 410 (2010)

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[7] Moreover, the cases involving § 16(b) provide even stronger support for the defendants' position here, as § 16(b) involves language more susceptible than that of § 16(a) or the Lautenberg Amendment to a reading that encompasses reckless conduct Compare 18 U S.C § 16(b) (defining a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), with Model Penal Code § 2 02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct ") Yet most courts nonetheless have rejected arguments that § 16(b) can be satisfied by a predicate offense with a mens rea of recklessness See, e.g., Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003) ("[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force '" (internal quotation marks omitted) (quoting Dalton v Ashcroft, 257 F 3d 200, 208 (2d Cir 2001)))

(quoting Cleveland v United States, 531 U S 12, 25 (2000)) [8] The rule of lenity bars courts from giving the text of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant " Burrage v United States, 134 S Ct 881, 891 (2014) In my view, by permitting a conviction based on the reckless causation of offensive physical contact, the government and the majority seek to give the "use of physical force" a meaning different from that phrase's ordinary meaning The ordinary meaning of the "use" of physical force requires the intentional employment of force, and not the merely accidental, negligent, or reckless use of such force Cf. Leocal v Ashcroft, 543 U.S 1, 4 (2004) (giving an ordinary and natural reading to the phrase "'use of physical force against the person or property of another,'" and holding that this phrase requires "a higher degree of intent than negligent or merely accidental conduct" (quoting 18 U S C § 16(a))); id. (explaining that "'use' requires active employment," and reasoning that "a person would 'use physical force against' another when

[8] In addition to its acknowledgment that this is a "close" case, the majority's reliance on legislative history also suggests that the statutory text is ambiguous Cf. Tenn. Valley Auth. v Hill, 437 U S 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning ") Furthermore, the contrasting results reached by the First Circuit and our sister circuits on the interpretation of the phrase "use of physical force" provide additional evidence of that statutory text's ambiguity

pushing him [but not] by stumbling and falling into him"); Garcia v Gonzales, 455 F 3d 465, 468 (4th Cir 2006) (holding that "the use of physical force" requires the intentional employment of physical force) Moreover, given that the Supreme Court has stated that (1) "the merely reckless causation of bodily injury may not be a 'use' of force," and (2) "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute the "use" of force, Castleman, 134 S Ct at 1414 & n 8, I cannot see how the proper application of the rule of lenity permits affirmance of the defendants' convictions

I express no opinion here on whether the "use" of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact Rather, I confine my inquiry to one subsumed offense under the Maine assault statutes: the reckless causation of offensive physical contact Although the majority states that they fail to see why the distinction between "bodily injury" and "offensive physical contact" "is material to the analysis here," ante, at 22, I explain herein why that distinction matters See infra Section II(B)(1) Namely, even if recklessness were a sufficient mens rea for purposes of bodily injury, a conviction

under the Lautenberg Amendment nonetheless cannot rest on the reckless causation of offensive physical conduct in Maine [9]

The Supreme Court has stated that, under the Lautenberg Amendment, Congress classified as a "'misdemeanor crime of domestic violence'" "the type of conduct that supports a common-law battery conviction " Castleman, 134 S. Ct at 1411 The Supreme Court has further explained that "the common-law crime of battery consisted of the intentional application of unlawful force against the person of another " Johnson v United States, 559 U S 133, 139 (2010) (emphasis added); see also United States v Bayes, 210 F 3d 64, 69 (1st Cir 2000) ("[T]he common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched

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[9] All of the examples cited by the majority -- squeezing, shoving, a squeeze of the arm that causes a bruise, shooting a powerful handgun in the direction of a neighbor's home, driving a van to make contact with another vehicle and to push the victim's vehicle into heavy oncoming traffic, a husband throwing a knife towards his wife intending to instill fear but actually striking her, and waving a lit cigarette near a child in anger so that the cigarette touches and burns the child, ante, at 3, 12, 19-20, 21-22 -- involve intentional conduct that is reckless as to the result, which in nearly all of those examples is bodily injury By contrast, the Maine statutes at issue here permits conviction for far less culpable conduct: merely reckless conduct that is also reckless as to the result of offensive physical contact In so doing, the majority conflates mens rea as to the result with mens rea as to the underlying conduct that causes the result It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does not permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching

another in a deliberately offensive manner without a valid reason to do so.") (emphasis added); State v Rembert, 658 A.2d 656, 658 (Me 1995) (stating that "[u]npermitted and intentional contacts [are] actionable as an offensive contact") (emphasis added); cf. Wayne R. LaFave, 2 Substantive Criminal Law § 16 2(c)(2) n 32 (2d ed.) ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); Black's Law Dictionary 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification") (emphasis added) To trigger a violation of the Lautenberg Amendment, therefore, the relevant precedent counsels that the offensive touch must be caused intentionally and not merely recklessly By contrast, the Maine statutes at issue here permit conviction for recklessly causing an offensive touch.[10] Therefore, a conviction under either of the Maine assault statutes implicated here does not categorically establish a violation of the Lautenberg Amendment Given that the record does not permit a conclusion that the defendants' Maine convictions rested on a subsumed offense that

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[10] To recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact -- something more than a mere touching -- that a reasonable person would find to be offensive under the circumstances See Me. Rev Stat tit 17-A, § 35(3) (defining recklessness); id. § 207(1)(A) (simple assault); id. § 207-A(1)(A) (domestic violence assault) Therefore, to sustain a Maine conviction for this subsumed offense, the defendant need not intend that physical contact occur nor intend that the contact be considered offensive

does constitute a violation of the Lautenberg Amendment, the federal convictions at issue here cannot stand.[11]

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[11] Despite the foregoing, the majority opinion offhandedly rejects the relevance of the mens rea for battery under the common law See ante, at 16 ("The parties agree that, under Castleman, the term 'use of physical force' also incorporates the common law mens rea for battery They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view We decline the parties' invitation to define the mens rea of a common law battery ") (citations omitted) At the same time, the majority cites Castleman for the proposition that the "use" of physical force includes offensive contact, due to the common-law meaning of "force" for purposes of battery Id. The majority opinion thus relies on the actus reus for battery under the common law, but simultaneously rejects the relevance of the accompanying mens rea for common-law battery See id. In so doing, the majority fails to sufficiently justify its decision to "decline" the parties' "invitation" to consider the import of the mens rea of common-law battery to the question at bar Such a decision requires justification, particularly because the Supreme Court in Castleman also extended an "invitation" for us to consider this issue when it explained that Congress intended to classify as a "'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction " See Castleman, 134 S Ct at 1411

Nothing in Castleman suggests that the phrase "type of conduct" refers only to the actus reus for battery and not also the accompanying mens rea. Indeed, the contrary conclusion makes far more sense If Congress meant to incorporate the common-law crime of battery, it most likely meant to incorporate both the actus reus and its accompanying mens rea See, e.g., United States v Zhen Zhou Wu, 711 F 3d 1, 18 (1st Cir 2013) ("'In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur '" (quoting United States v Apfelbaum, 445 U S 115, 131 (1980))); United States v Cornelio-Pena, 435 F 3d 1279, 1286 (10th Cir 2006) (stating that "most crimes require[] both mens rea and actus reus"); cf. United States v Freed, 401 U.S 601, 607-08 (1971) (explaining that when "Congress borrows terms of art" from the common law, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word" (internal quotation marks and citation omitted))

After giving careful consideration to the issues involved, engaging in the necessary statutory interpretation and legal analysis, and applying the relevant precedent, I heed the Supreme Court's direction and follow the lead of our sister circuits in disagreeing with the majority's conclusion Therefore, I respectfully dissent

I Legal Background

A. The Statutory Framework

1 The Lautenberg Amendment

The defendants here were charged with violating the Lautenberg Amendment to the Gun Control Act of 1968, now codified at 18 U S C. § 922(g)(9) (the "Lautenberg Amendment" or "§ 922(g)(9)") Under the Lautenberg Amendment, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to possess in or affecting commerce, any firearm or ammunition " 18 U.S C § 922(g)(9) For these purposes, a "misdemeanor crime of domestic violence" is further defined in 18 U.S C § 921(a)(33)(A) as an offense that:

> (I) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or

> guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[ ]

Id. § 921(a)(33)(A) (emphases added)

2 The Relevant Maine Assault Statutes

The defendants argue that the relevant Maine assault statutes do not "ha[ve], as an element, the use or attempted use of physical force " See id. Under Maine law, a defendant is guilty of "domestic violence assault" if (1) the defendant violates the Maine simple assault provision, and (2) "the victim is a family or household member " See Me Rev Stat tit 17-A, § 207-A(1)(A)

Turning to the simple assault provision in the Maine Criminal Code, a person is guilty of "assault" if "[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." See § 207(1)(A) Thus, there are six different, divisible permutations of the Maine simple assault statute, each of which can form the basis for a section 207 assault conviction. United States v Carter, 752 F 3d 8, 17-18 (1st Cir 2014) ("The Maine general-purpose assault statute is divisible into six permutations of subsumed offenses, based on the combination of one element from each of two categories: (1) mens rea ('intentionally, knowingly or recklessly'), and (2) actus reus ('causes bodily injury or offensive physical contact to another person') " (quoting § 207(1)(A))) These six subsumed offenses are illustrated in the following chart:

The six variants of the Maine simple assault statute:

Maine simple assault statute, Me Rev Stat tit 17-A, § 207(1)(A)		**Actus Reus**	
		causes bodily injury	**causes offensive physical contact.**
Mens Rea	**Intentionally**	1 Intentionally causes bodily injury	4 Intentionally causes offensive physical contact
	Knowingly	2 Knowingly causes bodily injury	5 Knowingly causes offensive physical contact
	Recklessly	3 Recklessly causes bodily injury	6 Recklessly causes offensive physical contact

In Maine state court, Armstrong was convicted of Maine domestic-violence assault under section 207-A, and Voisine was convicted of Maine simple assault under section 207 [12] These prior convictions served as the predicate offenses for the defendants' § 922(g)(9) charges, which are the subject of the instant appeal A simple assault statute lacking a domestic-relationship element (such as Voisine's prior offense of conviction in Maine) can nonetheless serve as the predicate offense for a misdemeanor crime of domestic violence, so long as the domestic-relationship element

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[12] Violation of either provision -- the general assault offense or "domestic violence assault" -- constitutes a "Class D" crime under the Maine Criminal Code, which is equivalent to a misdemeanor See State v Allen, 377 A 2d 472, 475 n 4 (Me 1977) ("We therefore deem Class D and Class E crimes to be the Criminal Code equivalents of misdemeanors ")

is proved in the subsequent federal prosecution See United States v Hayes, 555 U S 415, 418 (2009) (holding "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense")

B. The Categorical and Modified Categorical Approaches

Given the foregoing statutory framework, we must analyze whether the elements of the Maine assault statute necessarily fulfill the requirements of the Lautenberg Amendment In cases such as this -- where a court must decide whether a prior conviction for an earlier offense (like assault) satisfies one of the elements of the offense in a subsequent prosecution (here, for example, whether the earlier offense "has, as an element, the use of physical force," 18 U S C § 921(a)(33)(A)) -- the court determines whether it is appropriate to apply the categorical approach or the modified categorical approach

1 The Categorical Approach

In Taylor v United States, 495 U S 575, 600 (1990), the Supreme Court described the categorical approach, under which courts "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions " See also United States v Dávila-Félix, 667 F 3d 47, 56 (1st Cir 2011) (same) If the "statutory definition" of the prior offense necessarily meets the requirements of the subsequent

offense at issue, then the court can determine that a conviction for the prior offense categorically constitutes a valid predicate offense for purposes of the later prosecution See Castleman, 134 S Ct at 1414

2 The Modified Categorical Approach

Some statutes, like the Maine assault statutes at issue here, are "divisible": they "set[] out one or more elements of the offense in the alternative " See Descamps v United States, 133 S Ct 2276, 2281 (2013) For these statutes, some permutations or variants of the subsumed offenses may categorically meet the requirements of the subsequent offense, whereas others may not Accordingly, for these divisible statutes, courts may apply the "modified categorical approach" to determine which variant or subsumed offense formed the basis for the prior conviction, and thus whether that prior conviction can serve as a valid predicate offense for the subsequent prosecution See Castleman, 134 S Ct at 1414 Under this approach, a court may "consult[ ] the trial record -- including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms" -- in order to "determine which statutory phrase was the basis for the conviction" under such a divisible statute Johnson, 559 U S at 144 These documents are often called "Shepard documents," after

Shepard v United States, 544 U S 13 (2005) (plurality opinion) See, e.g., Carter, 752 F 3d at 19-20 & 19 n 12

3 Application

Under established precedent not called into doubt by Castleman and not challenged here, certain subsumed offenses under the Maine assault statutes (such as the intentional or knowing causation of bodily injury) are unequivocally valid predicate offenses for the Lautenberg Amendment See Castleman, 134 S Ct at 1415 ("It is impossible to cause bodily injury without applying force in the common-law sense," and "the knowing or intentional application of force is a 'use' of force ") If the Shepard documents showed that the defendants' prior assault convictions were for those particular subsumed offenses, for example, then we would be able to apply the modified categorical approach and affirm the defendants' Lautenberg Amendment convictions without reaching the recklessness issue See Carter, 752 F 3d at 18 n 11 (reasoning that under the modified categorical approach, if the Shepard documents showed that the defendant's prior Maine conviction was for intentional or knowing conduct, then the court could affirm his conviction under the Lautenberg Amendment) The parties agree, however, that the Shepard documents for Armstrong's and Voisine's underlying Maine convictions are inconclusive and do not reveal which variants of the Maine assault statutes served as the bases

for their convictions Therefore, the modified categorical approach cannot resolve this appeal

Rather, we must apply the categorical approach to determine whether the statutory definitions of the Maine assault provisions necessarily include the "use or attempted use of physical force " See 18 U S C §§ 921(a)(33)(A), 922(g)(9); see also Castleman, 134 S Ct at 1414 Under the categorical approach, if any one of the six variants of the Maine assault statute does not necessarily constitute the "use of physical force," then the defendants' convictions must be reversed. Put differently, to affirm the defendants' convictions under the categorical approach, all of the subsumed offenses under the Maine statute must have the "use or attempted use of physical force" as an element 18 U S.C §§ 921(a)(33)(A); see also United States v Holloway, 630 F 3d 252, 257 (1st Cir 2011) (stating that under the categorical approach, "the [prior] conviction may only serve as a predicate offense if each of the possible offenses of conviction would qualify" as individually satisfying the offense in the subsequent prosecution (citing Shepard, 544 U S at 26)) The defendants focus their argument on the sixth and least severe subsumed offense: the "reckless" causation of "offensive physical contact " Therefore, we must apply the governing precedent to decide whether this statutory definition necessarily involves the "use of physical force "

C. The Supreme Court's Decisions in Leocal and Johnson

The Supreme Court's opinions in Leocal v Ashcroft, 543 U S 1 (2004), and Johnson v United States, 559 U.S. 133 (2010), provided foundational reasoning for subsequent cases relevant to this appeal In both of these cases, the Supreme Court engaged in statutory interpretation to determine whether the offenses underlying prior state convictions had, as an element, the "use" of physical force as required for purposes of a subsequent federal proceeding

1 Leocal

In Leocal, the Supreme Court examined a similar question to that facing us today, regarding parallel language in the statutory definition of a "crime of violence" under 18 U.S C § 16(a) Under that statute, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another " 18 U S C § 16(a) (emphasis added) The petitioner in Leocal had previously been convicted in Florida state court for driving under the influence of alcohol (DUI) and causing serious bodily injury Leocal, 543 U.S at 3 The Supreme Court held that the petitioner's DUI conviction was not a crime of violence under 18 U S C § 16 Id. at 4 In so holding, the Court explained that "'use' requires active employment," reasoning that "a person would 'use physical force against' another when pushing him

[but not] by stumbling and falling into him." Id. Giving the operative phrase in 18 U S.C. § 16(a) its ordinary and natural reading, in context, the Leocal Court held that the "'use of physical force against the person or property of another'" requires "a higher degree of intent than negligent or merely accidental conduct " Id. (quoting 18 U S C § 16(a)) The Court also interpreted parallel language in 18 U S C § 16(b), giving that language "an identical construction" and "requiring a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense " Id. at 11

Additionally, the Court considered the fact that it was "ultimately determining the meaning of the term 'crime of violence.'" Id. It reasoned that "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses " Id. Therefore, the Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes " Id. Importantly for the instant case, the Leocal Court held only that negligent and accidental conduct did not constitute the "use" of force and thus a crime of violence under 18 U.S.C § 16; the Court did not reach the question whether reckless conduct would be

sufficient Id. at 13 ("This case does not present us with the question whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U S.C. § 16 ")

2 Johnson

In Johnson, the Supreme Court considered a related question: "whether the Florida felony offense of battery by '[a]ctually and intentionally touch[ing]' another person, Fla. Stat § 784 03(1)(a), (2) (2003), 'has as an element the use of physical force against the person of another,' 18 U S.C § 924(e)(2)(B)(I), and thus constitutes a 'violent felony' under the Armed Career Criminal Act, § 924(e)(1) " Johnson, 559 U S at 135 (alterations in original) The Court observed that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight '" Id. at 138 (quoting State v Hearns, 961 So 2d 211, 218 (Fla 2007)) Even "[t]he most 'nominal contact,' such as a 'ta[p] on the shoulder without consent,'" is sufficient to constitute a violation of the Florida law Id. (second and third alterations in original) (quoting Hearns, 961 So 2d at 219)

In determining the definition of "physical force" under the Armed Career Criminal Act ("ACCA"), the Court sought to give the phrase "its ordinary meaning" while keeping in mind the context of its inquiry: defining the statutory category of violent

felonies Id. at 138-40 In that context, the Court thought "it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force -- that is, force capable of causing physical pain or injury to another person " Id. at 140 The Johnson Court explicitly limited its holding to the ACCA, asserting that its decision would not extend to the Lautenberg Amendment See id. at 143-44 ("We have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony ' We do not decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence The issue is not before us, so we do not decide it.")

D Pre-Castleman First Circuit Precedent: Nason, Booker, Armstrong I, and Voisine I

Prior to the Supreme Court's decision in Castleman, the defendants' arguments were squarely foreclosed by First Circuit precedent; it is this precedent that the Supreme Court has instructed us to reconsider

In United States v Nason, 269 F 3d 10 (1st Cir 2001), which also considered the interplay between the Maine simple assault statute and the Lautenberg Amendment, we held that the actus reus of "offensive physical contact" necessarily involved the "use or attempted use of physical force," id. at 11-12, 21 Synthesizing the definitions of "physical force" from Black's Law Dictionary and other dictionaries, we determined that "physical

force may be characterized as power, violence, or pressure directed against another person's body " Id. at 16 We thus held that § 922(g)(9) does not require that the predicate offense involve "bodily injury," but rather can be satisfied by "any physical force" -- including offensive physical contact -- "regardless of whether that force resulted in bodily injury or risk of harm." Id. at 16-18 Therefore, Nason established that either actus reus prong of the Maine assault statute -- bodily injury or offensive physical contact -- could serve as a valid predicate conviction for purposes of § 922(g)(9) Id. at 21 ("[B]oth [actus reus] variants of assault regulated under Maine's general-purpose assault statute necessarily involve the use of physical force ")

Whereas Nason focused on the actus reus variants of the Maine assault statute for purposes of the Lautenberg Amendment, we later focused on the mens rea variants in United States v Booker, 644 F 3d 12 (1st Cir 2011) In Booker, we rejected the argument that only an intentional offense could constitute a misdemeanor crime of domestic violence under § 922(g)(9) Id. at 13-14 The appellants in Booker sought to rely on the Supreme Court's decisions in Leocal and Johnson, analogizing to the definition of "crime of violence" under 18 U S.C § 16 and the definition of "violent felony" under the ACCA, 18 U S.C § 924(e) Id. at 18-19 We held that those other statutes were not sufficiently analogous to dictate the result in Booker, reasoning that, for example,

"[w]hereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims -- those in a relationship with a perpetrator of domestic violence " Id. at 21 We thus turned to the "plain, unambiguous language of § 922(g)(9)," finding that "the statutory definition of 'misdemeanor crime of domestic violence' does not prescribe an intentional mens rea " Id. (quoting 18 U S C § 922(g)(9)) Therefore, we held "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9) " Id. (quoting 18 U S.C. § 922(g)(9))

On the initial appeal in this case, United States v Armstrong, 706 F 3d 1, 5 (1st Cir 2013) ("Armstrong I"), vacated, 134 S Ct 1759 (2014), we considered Armstrong's arguments that the Lautenberg Amendment's prohibition on gun ownership does not apply to non-violent offensive physical contact We found the defendant's argument on this issue to be squarely foreclosed by our prior decisions in Nason and Booker Id. at 2 (citing Booker, 644 F 3d 12; Nason, 269 F 3d 10) On that basis, we rejected Armstrong's statutory interpretation arguments and affirmed the decision of the district court Id. at 2-6, 8 That same day, we issued an opinion in United States v Voisine, 495 F App'x 101 (1st Cir 2013) (per curiam) ("Voisine I"), vacated sub nom.

Armstrong v United States, 134 S Ct 1759 (2014) In a per curiam opinion, we stated that Voisine had raised "the exact same arguments" as those raised in Armstrong I Id. Because there were "no pertinent factual differences distinguishing" Voisine I from Armstrong I, we incorporated Armstrong I's reasoning into the Voisine I per curiam opinion and affirmed the district court's decision Id. at 102 Both defendants appealed our decisions in to the Supreme Court

E Castleman and Its Aftermath

1 The Supreme Court's Castleman Opinion

Approximately one year later, while the petitions for writs of certiorari were pending in Armstrong I and Voisine I, the Supreme Court issued its opinion in Castleman, 134 S Ct. 1405 The defendant in Castleman had pleaded guilty to a Tennessee offense for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child. Id. at 1408-09 After federal authorities subsequently learned that he was selling firearms on the black market, Castleman was indicted on two counts of violating the Lautenberg Amendment Id. at 1409 He argued that the Tennessee statute did not have the use, or attempted use, of physical force as an element of the offense. Id. (citing 18 U S.C § 921(a)(33)(A)(ii)) The Sixth Circuit affirmed the dismissal of Castleman's convictions on the § 922(g)(9) counts, holding that the Tennessee conviction was not a valid predicate offense because

Castleman might have been convicted for "'caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent '" See id. at 1409-10 (quoting United States v Castleman, 695 F 3d 582, 590 (6th Cir 2012)) The Supreme Court reversed, reasoning that Castleman had pleaded guilty to intentionally or knowingly causing bodily injury, which "necessarily involves the use of physical force " Castleman, 134 S Ct at 1414

The Court explained that "physical force" for purposes of § 922(g)(9) encompasses "the common-law meaning of 'force' -- namely, offensive touching " Id. at 1410 The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context" -- acts like slapping, shoving, pushing, grabbing, hair-pulling, and spitting Id. at 1411 & n 5

The Castleman Court further explained that there are two main categories of assault or battery laws generally used to prosecute domestic abusers: "those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter " Id. at 1413 Interpreting "physical force" to exclude a mere "offensive touching" would have rendered the Lautenberg Amendment "ineffectual in at least 10 States -- home to nearly thirty percent of the Nation's population -- at the time of its enactment " Id. (footnote omitted) Therefore, the Court

held that the "physical force" requirement is satisfied "by the degree of force that supports a common-law battery conviction" -- including an offensive touching Id.

The Court considered whether it could apply the "categorical approach" articulated in Taylor, 495 U S 575, to resolve the issue, asking if the elements of the Tennessee statute necessarily met the requirements of § 922(g)(9) Castleman, 134 S Ct at 1414 If the answer were in the affirmative, then the Court could conclude that "a domestic assault conviction in Tennessee categorically constitutes a 'misdemeanor crime of domestic violence '" Id.

Expressing skepticism regarding such a categorical conclusion, the Court stated that "[i]t does not appear that every type of assault defined by [the Tennessee statute] necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'" Id. at 1413-14 (quoting 18 U S C § 921(a)(33)(A)) For example, the Court reasoned that under the Tennessee statute, "[a] threat may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury may not be a 'use' of force " Id. at 1414 The Court noted that in Leocal it had "reserved the question whether a reckless application of force could constitute a 'use' of force," id. at 1414 n 8 (citing Leocal, 543 U S 1), but emphasized that "the Courts of Appeals have almost uniformly held that

recklessness is not sufficient," id. (contrasting our holding in Booker, 644 F 3d 12, with the decisions of ten of our sister courts of appeals: the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) The Court declined to hold that a conviction under the Tennessee statute categorically constitutes a misdemeanor crime of domestic violence for purposes of § 922(g)(9) See id. at 1414

On the heels of its Castleman opinion, the Supreme Court vacated our prior decisions in Voisine I and Armstrong I, and it remanded those two cases for reconsideration in light of its decision in Castleman. See Armstrong I, 134 S Ct 1759 ("Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of United States v Castleman, [134 S. Ct 1405] (2014) ") There is little disagreement that this remand order calls for us to consider the impact of Castleman's Footnote Eight on our prior precedent, particularly Booker and Nason. In that footnote, the Supreme Court contrasted our Booker holding with the decisions of ten of our sister circuits, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to "constitute a 'use' of force " Id. at 1414 n 8

2 The First Circuit's Carter Opinion

In the wake of Castleman and the Supreme Court's remand of the instant cases, we issued an opinion in United States v Carter, 752 F 3d 8 (1st Cir 2014) Among other arguments, the defendant in that case, Wayne Carter, raised similar issues to those examined in Armstrong I Id. at 9-10 Carter had been convicted in 1997 of a misdemeanor assault in Maine, after his live-in girlfriend at the time, Annie Eagan, told police officers that Carter spit in her face and shoved her right shoulder Id. at 10 Eagan reported that she was not hurt, that she did not want Carter arrested or charged with an offense, and that she only wanted him removed from the house Id. at 10-11 Nonetheless, the Maine state prosecutor charged Carter under Maine's general-purpose assault statute, to which Carter pleaded guilty and was sentenced to time served: thirty days in jail Id. at 11

Approximately thirteen years later, in 2010, Carter obtained a loan by pawning a rifle that he had inherited from his dead father Id. at 10 A records check and further investigation in connection with his pawning activities revealed Carter's prior misdemeanor assault conviction. Id. The pawn shop's records showed that Carter had pawned and redeemed three separate rifles multiple times between 2007 and 2010 Id. at 11 All of the rifles were inherited from his father Id. at 11 n 2 "The firearms were kept in a locked cabinet at his mother's house, and

Carter only physically possessed the rifles in connection with pawning them." Id. Based on the foregoing, Carter was charged in a one-count indictment for violating the Lautenberg Amendment's prohibition on gun possession by those convicted of a misdemeanor crime of domestic violence Id. at 11 After entering a conditional guilty plea, reserving his right to appeal, Carter was sentenced by the district court to be imprisoned for twelve months and one day -- a downward variance from the bottom of the Sentencing Guidelines range: eighteen months Id. at 9, 12 He then appealed, arguing, among other things, that the commission of simple assault by recklessly causing offensive physical contact does not constitute the "use of physical force" as required to establish a misdemeanor crime of domestic violence under the Lautenberg Amendment Id. at 10

On appeal, we noted that although this argument was previously foreclosed by our holding in Booker, "the Supreme Court's recent decision in Castleman casts doubt upon this holding " Id. at 18 (citing Castleman, 134 S Ct at 1414 & n 8) In support of that assertion, we cited the Supreme Court's statements that "'the merely reckless causation of bodily injury under [the Tennessee assault statute] may not be a "use" of force,'" id. (alteration in original) (quoting Castleman, 134 S. Ct at 1414), and that "'the Courts of Appeals have almost uniformly held that recklessness is not sufficient' to 'constitute

a "use" of force,'" id. (quoting Castleman, 134 S Ct at 1414 n.8) Although Castleman had not directly overruled our prior decision in Booker, we noted that these statements from the Supreme Court provided a "'sound reason' for thinking that the Booker panel might well 'change its collective mind' in light of Castleman." Id. at 18 n 11 (quoting United States v Rodriguez-Pacheco, 475 F 3d 434, 442 (1st Cir 2007))

Despite the Supreme Court's statements in Castleman calling into question our prior precedent on this question, it was unnecessary in Carter to answer the recklessness issue, because Carter potentially could have been resolved via the modified categorical approach: the underlying Shepard documents might have "ultimately show[n] that Carter's conviction was under one of the other two mens-rea prongs of the statute -- 'intentionally' or 'knowingly'" Id. We thus observed that under Castleman, "the validity of Carter's § 922(g)(9) conviction may depend on which mens-rea prong of the Maine general-purpose assault statute served as the basis for his guilty plea and conviction." Id. at 18 Examining the record for Shepard documents that could determine which variant of the Maine assault statute was the basis for Carter's conviction, we found the record incomplete and undeveloped: it was unclear whether such documents existed. See id. at 20-21 ("It is not clear whether there are any other 'approved' Shepard documents or comparable judicial records

available with respect to Carter's prior assault conviction [T]he record is insufficiently developed to determine which variant of the Maine general-purpose assault statute served as the basis for Carter's conviction ") Accordingly, we "remand[ed] the case to the district court to allow the parties to further develop the record on this issue," consistent with the Supreme Court's opinion in Castleman Id. at 21 In so doing, we reserved the question presented by the Supreme Court's vacatur of Armstrong I and Voisine I in light of Castleman, allowing us to squarely address that issue in the instant remand.

3 District Courts' Application of Castleman and Carter

To date, three different district court judges in the First Circuit have applied the reasoning of Castleman's Footnote Eight regarding these issues; all three opinions concluded that a recklessly committed Maine assault does not necessarily involve the "use" of physical force and thus is not categorically a misdemeanor crime of domestic violence United States v Sales, No. 2:13-CR-137-NT, 2014 WL 3405658 (D. Me July 11, 2014); United States v Carter, No 2:10-cr-00155-GZS, 2014 WL 3345045 (D. Me July 8, 2014); United States v Hines, No 1:12-cr-00204-JAW, 2014 WL 1875164 (D. Me May 9, 2014) Each of these three cases is examined below, in the order that they were decided.

a. Hines

The first district court case to apply the decisions in Castleman and Carter to these issues was Hines, 2014 WL 1875164 The defendant in Hines had pleaded guilty in Maine state court to violating the domestic violence assault statute; the Shepard documents revealed no further details regarding the conduct underlying this offense Id. at *2 Before the district court, the defendant argued, among other things, that a mens rea of recklessness could not satisfy the "use of force" requirement under the Lautenberg Amendment Id. at *4 The district court noted that pre-Castleman First Circuit precedent had previously foreclosed this argument, and "[t]he question is how Castleman affects the resolution of the issues [the defendant] has raised." Id. at *7

Examining Castleman's Footnote Eight, the court observed that "[t]his footnote, which cited ten circuit courts as concluding that reckless conduct did not constitute 'use of physical force,' strongly hinted that the First Circuit's Booker decision was an outlier " Id. at *8 The district court then considered the Supreme Court's vacatur of Armstrong I in light of Castleman Id. The court explained that "[r]eading Supreme Court tea leaves is chancy, but the First Circuit decision in Armstrong I was consistent with Castleman except for the Circuit Court's brief recklessness analysis " Id. Thus, the court found that "[i]t is

a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in Armstrong I was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis " Id. Accordingly, on the basis of Castleman, the vacatur of Armstrong I, and Carter, the district court concluded that it is "questionable" whether a Maine conviction for domestic assault -- "without more" -- qualifies as a valid predicate conviction for the Lautenberg Amendment Id. at *9

b. Carter

Following our remand instructions in Carter, the district court permitted the parties to further develop the record with Shepard documents to determine which subsumed variant of the Maine assault statute formed the basis of Carter's prior state misdemeanor conviction Carter, 2014 WL 3345045, at *6 The only additional document available was a transcript of Carter's plea colloquy in Maine state court, in which Carter's attorney stated that "'discovery shows that this was no more than a push on the right shoulder, that it was nothing more serious than that '" Id. at *7 Accordingly, on the basis of all the Shepard documents, the district court was "unable to identify the offense of Carter's conviction " Id.

The district court cited Hines, including the statement that "'[i]t is a short logical step to conclude that the reason the

Supreme Court vacated the First Circuit decision in [Armstrong I] was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis '" Id. at *5 (quoting Hines, 2014 WL 1875164, at *8) The court further observed that "while the statement in Castleman was via dictum in a footnote, 'it is much more than an offhand comment [C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative '" Id. at *6 (quoting Crowe v Bolduc, 365 F 3d 86, 92 (1st Cir 2004)) (internal quotation marks omitted) Stating that it "cannot ignore the guidance of the Supreme Court and the First Circuit in Castleman, Armstrong and Carter," the district court concluded that "Carter's conviction may only stand if it was premised on more than accidental, negligent or reckless conduct " Id. Faced with the absence of any Shepard documents permitting such a finding, the district court granted Carter's motion to dismiss the indictment, holding that his 1997 conviction could not serve as a predicate misdemeanor for the Lautenberg Amendment Id. at *7

c. Sales

Sales, 2014 WL 3405658, is the third and, to date, final district court case to apply Castleman and Carter. The defendant in that case, Kenneth Sales, had pleaded guilty in Vermont state court to one count of "assault-simple-mutual affray" because he "engaged in a fight or scuffle entered into by mutual consent "

Id. at *1 (citing Vt Stat Ann tit 13, § 1023) In that plea colloquy, the Vermont Superior Court judge explained that Sales "recklessly caused bodily injury to a person, and that it was in a fight or scuffle entered into by mutual consent " Id. The judge further explained that "there was a physical altercation between [Sales] and [his girlfriend] and that in the course of it [he] at least recklessly caused bodily injury to her, being a scratch or a sort of cut that she received " Id. Explaining the actus reus of bodily injury, the judge stated that "[b]odily injury is any sort of injury, it doesn't have to be a broken bone or anything like that, it can be a bruise, a cut, kind of anything that hurts " Id. With respect to the mens rea, the judge explained that "[r]ecklessly means you did not have to intend a particular result, but you engaged in conduct that was not what a reasonable person would do in these circumstances, and had a very high risk that the result would happen " Id. Subsequent to this assault conviction in Vermont state court, Sales was charged with a violation of the Lautenberg Amendment in federal district court in Maine Id. at *2

The district court reviewed the governing precedent, including Castleman, Carter, and the previous two district court decisions described above, Hines and Carter Id. at *2-3 Observing that the Castleman court emphasized Leocal's holding that "use" requires active employment, the district court further

highlighted that "[t]he Supreme Court also pointed out that Booker is out of step with other circuit courts that have held that recklessness is not sufficient to constitute a 'use' of force " Id. at *3 (citing Castleman, 134 S Ct at 1414 n 8) Accordingly, the district court opined that "the Supreme Court's remand of Armstrong 'in light of Castleman' is fairly construed as a directive to the First Circuit to reconsider whether an assault committed recklessly is sufficient to meet the federal definition of a misdemeanor crime of domestic violence " Id. The district court agreed with Chief Judge Woodcock that "'[r]eading Supreme Court tea leaves is chancy,'" id. at *4 (quoting Hines, 2014 WL 1875164 at *8), but concluded that "it is hard to miss the message here," id. The court observed that the First Circuit may yet "decide that recklessness is sufficient," but that it would be "presumptuous" for the district court "to make that determination " Id. Therefore, the district court dismissed the defendant's indictment Id.

II. Discussion

On remand, the relevant inquiry is whether the "reckless" causation of "offensive physical contact" under Maine law necessarily constitutes the "use or attempted use of physical force" for purposes of the Lautenberg Amendment Compare Me Rev Stat tit 17-A, § 207, with 18 U S C §§ 921(a)(33)(A), 922(g)(9) As a matter of statutory interpretation, we need to compare the

text of each side of the equation: (a) the definition of the "reckless" causation of "offensive physical conduct" under the Maine assault statutes; and (b) the definition of the "use of physical force" under the federal Lautenberg Amendment The former inquiry is a question of Maine state law, while the latter is a question of federal law Applying the relevant precedent, this discussion concludes that the reckless causation of offensive physical contact in Maine does not necessarily constitute the "use" of physical force and thus is not categorically a "misdemeanor crime of domestic violence" under the Lautenberg Amendment

A. The Meaning of the "Reckless" Causation of "Offensive Physical Contact" Under Maine Law

1 The Meaning of "Reckless"

Under the applicable definition in the Maine Criminal Code, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Me Rev Stat. tit 17-A, § 35(3)(A) Additionally, "the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C)

The majority opinion describes this definition of "recklessness" as involving "a substantial amount of deliberateness

and intent " Ante, at 18 To support this assertion, the majority follows the government's brief in emphasizing that the definition requires that a person "consciously" disregard the risk involved, and that this disregard involves a "gross deviation" from the standard of reasonable and prudent conduct Id. at 18-19 Relying on this language, the government argues that "recklessness lies rather close to 'knowingly'" on the "volitional scale," and that recklessness "is arguably part and parcel of 'willfully '" Continuing, the government asserts that "[r]ecklessly is more akin to deliberately or knowingly " I disagree

Contrary to the claim that the Maine definition of recklessness involves "a substantial amount of deliberateness and intent," the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code Cf. Model Penal Code § 2 02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the

standard of conduct that a law-abiding person would observe in the actor's situation.") This Model Penal Code definition contains all of the elements and precise language highlighted by the majority as supposedly establishing "a substantial amount of deliberateness and intent " Cf. ante, at 18-19 ("consciously" disregards, "nature and purpose of the person's conduct and the circumstances known to [him]," and "gross deviation" from the standard of care) (emphases supplied by the majority)

As revealed in the chart below, the Maine definition of recklessness is also consistent with the equivalent definitions in the Model Penal Code, Black's Law Dictionary, and the majority of First Circuit jurisdictions

Source, Authority, or Jurisdiction	**Definition**
Model Penal Code § 2 02(2)(c) (emphases added)	"Recklessly A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation "
Black's Law Dictionary 1462 (10th ed. 2014) (emphases added)	"reckless, adj Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash • Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do. See recklessness. Cf careless; wanton "

Black's Law Dictionary 1462 (10th ed. 2014) (emphasis added)	"recklessness, n 1 Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. • Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing 2 The state of mind in which a person does not care about the consequences of his or her actions. -- Also termed heedlessness Cf wantonness."
Maine	"A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result [T]he disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev Stat tit 17-A, § 35(3)(emphases added) (subsections defining "recklessly" under the Maine Criminal Code section setting out "Definitions of culpable states of mind"); see also Stein v Me. Criminal Justice Acad., 95 A.3d 612, 618 (Me. 2014) (applying the foregoing statutory definitions of "recklessly" to the Maine general-purpose assault statute, § 207(1)(A))

Massachusetts	"Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another " Sandler v Commonwealth, 419 Mass 334, 644 N.E.2d 641, 643 (Mass. 1995) "[R]eckless conduct involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree but also a difference in kind." Id., 644 N.E.2d at 644 "To prove reckless battery, the Commonwealth must establish '(1) that the defendant's conduct involve[d] a high degree of likelihood that substantial harm will result to another, or that it constitute[d] disregard of probable harmful consequences to another and (2) that, as a result of that conduct, the victim suffered some physical injury '" United States v Holloway, 630 F 3d 252, 261 (1st Cir 2011) (quoting Commonwealth v Welch, 16 Mass App Ct 271, 450 N.E.2d 1100, 1102-03 (Mass. App. Ct 1983)) "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." Commonwealth v Welansky, 316 Mass 383, 55 N.E.2d 902, 910 (Mass 1944) (internal quotation marks omitted)
New Hampshire	"'Recklessly ' A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts recklessly with respect thereto." N.H. Rev Stat. § 626:2 (II)(c) (emphases added)

Puerto Rico	Old: "[W]hen the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act " P.R. Laws Ann tit. 33, § 5035 (2012) (unofficial translation supplied) New: "A person acts recklessly when he is conscious that his conduct generates a substantial and unjustified risk that the legally prohibited result or circumstance will be produced." 2014 P.R. Laws No 246, art 12 (enacting S.B. 1210, and modifying art 22(3) of Law 146-2012) (unofficial translation supplied) [13]

[13] The situation in Puerto Rico merits some further explanation Historically, under Puerto Rico's Penal Code, there were two culpable mental states: "intent" and "negligence " See P.R. Laws Ann tit 33, §§ 4650-4652 (2004) The definition of "intent" included three variants, generally corresponding to the concepts of "purposeful," "knowing," and "reckless" conduct under the Model Penal Code See id. § 4651; see also Dora Nevares-Muñiz, Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico, 12 1 Elec J Comp L. 16 (May 2008), available at http://www ejcl org/121/art121-14 pdf In the 2012 version of the Puerto Rico Penal Code, the third definition of "intent" covered reckless conduct: "when the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act " P.R. Laws Ann tit 33, § 5035 (2012) (unofficial translation supplied)

In 2014, a new law was proposed, passed by both the Puerto Rico Senate and the House of Representatives, and sent to the Governor for his approval See S.B 1210 (P.R. 2014) That law was signed and approved on December 26, 2014, and it takes effect on March 26, 2015 See 2014 P R. Laws No. 246 Article 12 of the new law eliminates the old culpable mental states (intent and negligence) and explicitly replaces them with the four mental states in the Model Penal Code: purposely, knowingly, recklessly, and negligently Compare id. art 12 (modifying art. 22 of Law No. 146-2012), with Model Penal Code § 2 02(2); see also P.R. House of Representatives, P. del S. 1210 Informe Positivo 9 (Nov 13, 2014), http://www tucamarapr org/dnncamara/Documents/Measures/9fda6cce-88d9-4e39-a6ae-0dc163f421dc pdf

Rhode Island	"[T]he use of the word 'reckless' or 'recklessly' in penal statutes connotes something more than the negligence necessary to support a civil action for damages, and that the two words impart a disregard by the accused for the consequences of his act and an indifference to the safety of life and limb. [T]he distinguishing factor, which properly classifies the operation of a motor vehicle as reckless, is that the evidence shows that a driver has embarked upon a course of conduct which demonstrates a heedless indifference to the consequences of his action " State v Lunt, 106 R.I 379, 260 A.2d 149, 151 (R.I 1969)

The definitions of "recklessness" in the preceding chart demonstrate that the Maine definition is a perfectly ordinary, textbook definition of the term. There is nothing about the Maine statute that sets it above and beyond the standard definitions provided in the Model Penal Code, Black's Law Dictionary, and the other jurisdictions in the First Circuit Nor does it seem that the Model Penal Code and the First Circuit jurisdictions are unique in their definitions of recklessness See, e.g., Ariz Rev Stat § 13-105 ("'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation ") (emphases added); N Y Penal Law § 15 05(3) ("A person acts recklessly with respect to a result or to a

circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation ") (emphases added) Thus, the Maine definition of "recklessness" is far from extraordinary, but rather embraces the standard, generally accepted definition of the term.

Applying that definition, I disagree with the government's assertion that "[r]ecklessly is more akin to deliberately or knowingly" than negligently The majority opinion echoes this claim, arguing that "Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur " Ante, at 19 The Supreme Court has held that negligent conduct cannot constitute the "use" of force See Castleman, 134 S Ct at 1414 n 8; Leocal, 543 U S at 9 On a volitional spectrum from "negligently" (clearly insufficient to constitute the "use" of force) to "intentionally" (clearly sufficient), the government and the majority seeks to place "recklessly" closer to the latter end. Yet the differences between the definitions of "recklessly" and "criminal negligence" are just as small as (if not smaller than) the differences between

"knowingly" and "recklessly " See Fernández-Ruiz, 466 F 3d at 1130 ("To the extent recklessness differs from criminal negligence, '[t]he difference between them is that criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk.'" (quoting In re William G., 192 Ariz 208, 963 P 2d 287, 292 n 1 (Ariz Ct App 1997))); see also 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed. 1993) Indeed, just as Maine's definitions of knowingly and recklessly "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," ante, at 19 (emphasis added), so too do Maine's definitions of recklessness and negligence "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," id. Compare Me Rev Stat tit 17-A, § 35(3)(A) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result "), with id. § 35(4)(A) ("A person acts with criminal negligence with respect to a result of the person's conduct when the person fails to be aware of a risk that the person's conduct will cause such a result ") Therefore, I find the attempt by the government and the majority to establish that "reckless" conduct in Maine is akin to knowing, willful, or

intentional conduct, or involves a "a substantial amount of deliberateness and intent," to be unavailing

2 The Meaning of "Offensive Physical Contact"

In this context, the actus reus of "offensive physical contact" has two constituent elements: first, there must be "physical contact," and second, the physical contact must also be "offensive " Under Maine law, the physical contact required is "not limited to direct touchings, but also c[an] be effected by indirect touchings (e g , the touching of items intimately connected to the body, such as clothing or a cane, customarily regarded as part and parcel of an individual's 'person') " Nason, 269 F 3d at 19 (citing State v Rembert, 658 A.2d 656, 658 (Me 1995))

Determining whether the physical contact is "offensive" is an objective test: courts ask whether a reasonable person would find the physical contact to be offensive, under the particular circumstances involved. See United States v Pettengill, 682 F Supp. 2d 49, 56 (D Me. 2010) (stating that "'offensive physical contact' means 'physical contact which a reasonable person would find offensive under the circumstances'" (quoting Donald G. Alexander, Maine Jury Instruction Manual § 6-59 (4th ed. 2003)); see also State v Pozzuoli, 693 A.2d 745, 747 (Me 1997)) ("[T]he question is whether a reasonable person would find the contact to be offensive "); Restatement (Second) of Torts § 19 ("A

bodily contact is offensive if it offends a reasonable sense of personal dignity ") Offensive physical contact, therefore, involves "'something less than bodily injury but requires more than a mere touching of another '" Nason, 269 F 3d at 19 (alteration in original) (quoting Pozzuoli, 693 A.2d at 747)

In examining the Maine assault statute, we have previously observed that "[t]wo factors distinguish mere touchings from offensive physical contacts: the mens rea requirement, and the application of a 'reasonable person' standard to determine whether a contact is offensive " Nason, 269 F 3d at 19 (citations omitted) Accordingly, to recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact -- something more than a mere touching -- that a reasonable person would find to be offensive under the circumstances See Me Rev Stat tit 17-A, § 35(3)(A); Nason, 269 F 3d at 19; Pettengill, 682 F Supp. 2d at 56; Pozzuoli, 693 A.2d at 747 Moreover, the disregard of that risk "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Me Rev Stat tit 17-A, § 35(3)(C)

B. The Meaning of "Use of Physical Force" Under Federal Law

1 The "Use" of "Force" and Common-Law Battery

The following discussion demonstrates that under the Lautenberg Amendment, the use-of-force requirement can be satisfied by an actus reus of an offensive touching, but such an offensive touch must be committed with a mens rea of intent rather than mere recklessness In Castleman, the Supreme Court held that "force," for purposes of the Lautenberg Amendment, incorporates the common-law meaning of "force " Castleman, 134 S Ct at 1410-11 The Court further stated that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction " Id. at 1411 On that basis, the Court held that "the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction" -- including an offensive touching Id. at 1413

I agree with the government's contention that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence'" not only "the type of conduct that supports a common-law battery conviction," id. at 1411, but also the culpable mental states that support a battery conviction under the common law See, e.g., Freed, 401 U S at 607-08 ("'(W)here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and

adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" (alteration in original) (quoting Morissette v United States, 342 U.S 246, 263 (1952))); see also Sekhar v United States, 133 S Ct. 2720, 2724 (2013) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses '" (quoting Neder v United States, 527 U S 1, 23 (1999))) Thus, as urged by both parties here and as suggested by the Supreme Court in Castleman, I turn to examine the culpable mental states that attach to the common-law crime of battery See Castleman, 134 S Ct at 1410-11

In Johnson, the Supreme Court explained that "the common-law crime of battery consisted of the intentional application of unlawful force against the person of another " Johnson, 559 U S at 139 (emphasis added) According to Supreme Court precedent, therefore, although the Lautenberg Amendment's "force" requirement can be satisfied by an actus reus of an offensive touching, such offensive contact must involve a mens rea of intent rather than mere recklessness See id.; see also Bailey v United States, 516 U S 137, 143 (1995) (defining the word "use" for purposes of the pre-1998 text of 18 U.S C § 924(c) -- which had provided certain penalties if the defendant "uses or carries a

firearm" during a crime of violence -- and holding that such "use" required "active employment" and not "mere possession of a firearm"), superseded by statute, Bailey Fix Act, Pub. L No 105-386, 112 Stat 3469 (1998), as recognized in Abbott v United States, 562 U.S 8 (2010); Rembert, 658 A.2d at 658 (stating that "[u]npermitted and intentional contacts [are] actionable as an offensive contact"); Lynch v Commonwealth, 131 Va 762, 109 S E 427, 428 (Va 1921) ("To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor "); id. at 428 (reasoning that when a man placed his hand on a woman's shoulder after she already rejected his romantic advances, the evidence was sufficient to justify a verdict of guilt for battery due to the defendant's "willful violation of the sanctity of her person" (emphasis added)); Black's Law Dictionary 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification")

The sources cited by the government do not demonstrate otherwise These sources suggest, at best, that a common-law battery by "bodily injury" or "infliction of harm" can be committed recklessly; they do not establish that a common-law battery by "offensive physical contact" can be committed recklessly See,

e.g., Model Penal Code § 211 1(1)(a) ("A person is guilty of assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another "); Wayne R. LaFave, 2 Substantive Criminal Law § 16 2(a) (2d ed.) ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes "); id. § 16 2(c)(2) n.32 ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); see also Commonwealth v Hawkins, 157 Mass 551, 32 N E 862, 863 (1893) (stating that "the intent necessary to constitute" an offense of assault and battery is the "intentional doing of an action which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury," without saying anything regarding whether such an offense could be committed by causing offensive physical contact)

The weakness of the government's argument is revealed by its selective citation and selective quoting For example, the government quotes a criminal law treatise for the proposition that "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness," but conveniently omits the immediately following clause at the end of that sentence: "-- that is, where there is subjective awareness of the high risk of physical injury " LaFave, supra, § 16 2(c)(2) (emphasis added) The unabridged sentence says

nothing about whether a battery by offensive touching can be committed by recklessness Indeed, in the same section, the cited treatise states that the modern approach "limit[s] battery to instances of physical injury " Id. § 16 2(a) Furthermore, the treatise explains that the Model Penal Code's assault provision "covers only causing 'bodily injury,' on the ground that 'offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided' elsewhere in the Code " Id. § 16 2(a) n 6 (quoting Model Penal Code § 211 1 cmt at 185 (1980)) Given the foregoing, there is no justification for the majority's heavy reliance on the legislative history of the Lautenberg Amendment See, e.g., Rubin v United States, 449 U S 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances '" (quoting Tenn. Valley Auth. v Hill, 437 U S 153, 187 n 33 (1978)) (internal quotation marks and citation omitted))

Contrary to the government's arguments, our decision in United States v Bayes, 210 F 3d 64 (1st Cir 2000), supports the conclusion that battery by offensive touching requires intent and not mere recklessness with respect to the offensiveness of the contact In Bayes, we evaluated the defendant's challenge to the sufficiency of the evidence to support his conviction for simple assault under 18 U S C § 113(a)(5) Bayes, 210 F 3d at 65 The

factual basis for the offense was that the defendant, Christopher Bayes, while on a Delta Airlines flight from Atlanta to England, "'put his hand on [a flight attendant's] buttocks and rubbed [her] buttocks and grabbed at the bottom of [her] buttocks,'" which a nearby passenger described as Bayes "'reaching behind the flight attendant and grabbing her in the rear end'" and "'squeezing '" Id. at 66 (second and third alterations in original) (quoting trial testimony) "Bayes persisted in being unruly despite periodic warnings from members of the crew." Id. "A scuffle ensued, ending only after the captain dumped thousands of gallons of fuel, diverted the aircraft in mid-flight, and made an unscheduled landing [in Maine] so that Bayes could be taken off the plane " Id.

Bayes argued that simple assault required "a specific kind of intent that the government failed to prove " Id. Namely, Bayes contended that "the government did not prove that he intended to injure [the flight attendant] or to threaten her with harm when he touched her on the buttocks " Id. at 67 Because the statute in question, § 113(a)(5), criminalized "[s]imple assault" but did "not define that term in any way," we "turn[ed] to the common law for additional guidance " Id. at 67-68 We stated that "the common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched another in a deliberately offensive manner

without a valid reason to do so " Id. at 69 (emphasis added) We reviewed prior opinions and determined that they "support the conclusion that, in a prosecution for simple assault under § 113(a)(5), it is sufficient to show that the defendant deliberately touched another in a patently offensive manner without justification or excuse " Id. (emphases added) Therefore, we held that the evidence supported Bayes's conviction because "the jury was entitled to conclude that Bayes had groped [the flight attendant] in a way that could not have been accidental, that must have been deliberate, and that was patently offensive " Id. (emphases added)

The preceding language from Bayes reveals that the mens rea required for a § 113(a)(5) battery-by-offensive-touching conviction is intent and not mere recklessness: the defendant must "deliberately" (and not accidentally) touch the victim in a "deliberately offensive" manner See id. By contrast, under the Maine assault statutes, a defendant can commit the offense recklessly by merely disregarding (a) the risk that his conduct will cause physical contact (more than a mere touching) to occur, and (b) the risk that a reasonable person would find that physical contact to be offensive See Me Rev Stat tit 17-A, § 35(3)(A) The "deliberate" intent that we required in Bayes is thus not necessary for a conviction for recklessly committed assault or domestic-violence assault in Maine

Therefore, the following conclusion must be drawn: under the Lautenberg Amendment, the "force" requirement can be satisfied by an actus reus of an offensive touching, but such an offensive touch must involve a mens rea of intent rather than mere recklessness That is, the defendant must intend to touch and intend that the touch be offensive, rather than merely disregard the risk that a touch will occur and be considered offensive By contrast, the Maine statutes at issue permit conviction when the defendant merely disregards a risk that his or her conduct will cause physical contact that a reasonable person would find to be offensive Accordingly, applying a categorical approach and the Supreme Court's statements in Castleman and Johnson, a conviction under either of the Maine assault statutes encompasses conduct beyond the common-law definition of battery, and thus does not necessarily establish a misdemeanor crime of domestic violence under the Lautenberg Amendment This conclusion mandates reversal here and is further supported by Footnote Eight of Castleman and the circuit court cases cited therein, as explained below

2 Castleman's Footnote Eight

In Castleman, the Supreme Court opined that the "merely reckless causation of bodily injury under the [Tennessee assault statute] may not be a 'use' of force." Castleman, 134 S Ct at 1414 The Court explained this statement in Footnote Eight, noting that Leocal held that "'"use" requires active employment.'" Id. at

1414 n 8 (quoting Leocal, 543 U S at 9) The Court then stated that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," contrasting decisions from ten other circuit courts of appeals against our opinion in Booker, which the Supreme Court listed as the only outlier [14] Together, as explained in more detail below, these cases establish that a predicate "crime of violence" under 18 U S C § 16 and analogous provisions must be committed with a degree of intentionality greater than recklessness Although § 16 is a different federal statute, its language is substantially similar to the definition of a misdemeanor crime of domestic violence for purposes of the Lautenberg Amendment In particular, the definition in § 16(a) is nearly identical to the equivalent definition for § 922(g)(9) Compare 18 U S C. § 16(a) (defining the term "crime of violence" to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of

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[14] Id. To illustrate contrast with our holding in United States v Booker, 644 F 3d 12, 19-20 (1st Cir 2011), the Supreme Court cited the following circuit court decisions in Castleman's Footnote Eight: United States v Palomino Garcia, 606 F 3d 1317, 1335-36 (11th Cir 2010); Jiménez-González v Mukasey, 548 F 3d 557, 560 (7th Cir 2008); United States v Zúñiga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008); United States v Torres-Villalobos, 487 F 3d 607, 615-16 (8th Cir 2007); United States v Portela, 469 F 3d 496, 499 (6th Cir 2006); Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1127-32 (9th Cir 2006) (en banc); Garcia v Gonzales, 455 F 3d 465, 468-69 (4th Cir 2006); Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005); Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926 (5th Cir 2001)

another"), with 18 U S C § 921(a)(33)(A) (defining a "misdemeanor crime of domestic violence" as an misdemeanor offense that "has, as an element, the use or attempted use of physical force") Keeping the similarity of the analogous statutes in mind, I review below each case cited by the Supreme Court in Castleman's Footnote Eight

a. Second Circuit

The Second Circuit considered the issue in Jobson v Ashcroft, 326 F 3d 367, 369 (2d Cir 2003), which examined whether second-degree manslaughter in New York constituted a crime of violence under 18 U S C. § 16(b) A "crime of violence" is defined in § 16(b) as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense " 18 U S.C § 16(b) [15] The Second Circuit

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[15] Given that § 16(b)'s definition includes offenses that merely "involve[] a substantial risk that physical force may be used," id. (emphasis added), its language is far more susceptible to a reading that it encompasses reckless conduct than is the equivalent language for § 16(a) and § 922(g)(9), which both require the "use" or "attempted use" of "physical force " See supra n 2; see also 18 U S C § 16(a); id. § 922(g)(9); id. § 921(a)(33)(A); Me Rev Stat tit 17-A, § 35(3) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result "); Model Penal Code § 2 02(2)(c) ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct ") Therefore, the cases holding that reckless conduct is insufficient to support a subsequent § 16(b) conviction provide even stronger support for the defendants' position than do the cases involving § 16(a) Cf. Garcia, 455 F 3d at 468 (reasoning that the "use" of "physical force" requires the intentional employment of physical force, and

reiterated its previous holding that "the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force '" Jobson, 326 F 3d at 373 (internal quotation marks omitted) (quoting Dalton v Ashcroft, 257 F 3d 200, 208 (2d Cir 2001))

To satisfy § 16(b)'s definition of "crime of violence," therefore, a defendant must have risked having to intentionally use force to commit the offense Id. at 374; see also id. at 373 ("[T]he risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end.") "By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of pure recklessness, may lack any 'intent, desire or willingness to use force or cause harm at all '" Id. at 374 (quoting United States v Parson, 955 F 2d 858, 866 (3d Cir 1992), abrogated on other grounds by Begay v United States, 553 U S 137 (2008)) Accordingly, the Second Circuit concluded that second-degree manslaughter in New York is not a crime a violence under

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therefore holding that a New York second-degree reckless assault conviction "does not contain an element that there be the intentional employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S C § 16(a)")

§ 16(b) and thus is not an aggravated felony justifying removal under the immigration laws Id. at 376

b. Third Circuit

The Third Circuit reached a similar result in Oyebanji v Gonzales, 418 F 3d 260, 263 (3d Cir 2005), which also involved immigration removal proceedings premised upon the definition of "crime of violence" under § 16(b) The petitioner's underlying conviction was for vehicular homicide under New Jersey law, which requires proof of recklessness Id. The Third Circuit thus stated that it was "required to decide the very question that the Leocal Court did not reach" -- "'whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U S C § 16.'" Id. (quoting Leocal, 543 U S at 13)

Citing the Leocal Court's distinction between "violent" crime and merely "accidental" conduct, the Third Circuit explained that "[t]he quintessential violent crimes -- murder, assault, battery, rape, etc. -- involve the intentional use of actual or threatened force against another's person, and the term 'accidental' is most often used to describe events that did not 'occur [ ] as a result of anyone's purposeful act.'" Id. at 264 (second alteration in original) (citing Black's Law Dictionary 16 (8th ed. 1999)) The Third Circuit reasoned that "accidental" conduct "is not enough to qualify as a crime of violence" under

Leocal, and it decided that such "accidental" conduct "would seem to include reckless conduct " Id. The panel further stated that the Third Circuit ought to follow the Supreme Court's "'considered dicta"' in Leocal, id. at 265 (quoting McCoy, 950 F 2d at 19), and that while the panel "appreciate[d]" the government's arguments, it "believe[d] that those arguments must be directed to the Supreme Court or Congress " Id.

c. Fourth Circuit

The Fourth Circuit considered these issues in Garcia v Gonzales, 455 F 3d 465 (4th Cir 2006) Garcia also involved removal proceedings and whether a certain predicate offense qualified as an aggravated felony by virtue of being "a crime of violence" under 18 U S C § 16 Id. at 468 The predicate offense considered in Garcia was reckless assault in the second degree under New York law, which provides that "'[a] person is guilty of assault in the second degree when (4) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument '" Id. (alterations in original) (quoting N Y Penal Law § 120 05) The Fourth Circuit summarily determined that the first definition of "a crime of violence" under § 16(a) -- "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" -- did not apply to the New York second-degree reckless assault conviction Id. at 468 (quoting 18 U.S C

§ 16(a)) The court reasoned that the definition of the New York offense "does not contain an element that there be the intentional employment of physical force against a person or thing, and thus is beyond the scope of 18 U S C § 16(a) " Id. (emphasis added) Therefore, according to the Fourth Circuit, "the use of physical force" requires the intentional employment of physical force See id.

Turning to the definition in § 16(b), the Fourth Circuit held that "recklessness, like negligence, is not enough to support a determination that a crime is a 'crime of violence '" Id. at 469 In making this determination, the Fourth Circuit held that in order to satisfy § 16(b)'s requirement that the predicate offense "involve a substantial risk that physical force against the person or property of another may be used," the force must "be applied as a means to an end." Id. (quoting Bejarano-Urrutia v Gonzales, 413 F 3d 444, 447 (4th Cir 2005)) (internal quotation marks omitted); see also id. ("[W]e are of opinion that 18 U S C. § 16(b) requires that the substantial risk involved be a substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury ")

d. Fifth Circuit

The Fifth Circuit considered the definition of "crime of violence" under 18 U S C § 16(b) in United States v Chapa-Garza, 243 F 3d 921 (5th Cir 2001) In that case, the Fifth Circuit

reasoned that § 16(b) requires that "the offender intentionally use the force against the person or property of another " Id. at 927 Because "[i]ntentional force against another's person or property is virtually never employed to commit" the offense of felony driving while intoxicated ("DWI") in Texas, the court held that "felony DWI is not a crime of violence as defined by 18 U S C § 16(b) " Id.

e. Sixth Circuit

In United States v Portela, 469 F 3d 496, 499 (6th Cir 2006), the Sixth Circuit followed the "'considered dicta'" of Leocal and the reasoning of the Third and Fourth Circuits to hold that "a crime requiring only recklessness does not qualify as a 'crime of violence' under 18 U.S C § 16," nor, because it "uses identical language," under U.S. Sentencing Guidelines Manual (U S S G.) § 2L1 2(b)(1)

f Seventh Circuit

Similarly, the Seventh Circuit followed its sister circuits in holding that "reckless crimes are not crimes of violence under Section 16(b) " Jiménez-González v Mukasey, 548 F 3d 557, 560 (7th Cir 2008) The Seventh Circuit found persuasive the Third Circuit's reasoning in Oyebanji that the use of physical force requires active employment and not merely negligent or accidental conduct Id. (citing Oyebanji, 418 F 3d at 263) The Seventh Circuit further reasoned that "accidental and

reckless crimes are not the type of 'violent' crimes Congress intended to distinguish as worthy of removal " Id. To support its holding, the Seventh Circuit emphasized the "primary distinction" that crimes of violence involve intentional conduct whereas most crimes of recklessness involve non-purposeful conduct. See id. at 561-62

g Eighth Circuit

Likewise, the Eighth Circuit stated that the Leocal "Court's reasoning suggests that crimes requiring only reckless disregard for the risk of physical injury to another are not crimes of violence under § 16 " United States v Torres-Villalobos, 487 F 3d 607, 615 (8th Cir 2007) Examining Minnesota law, the Eighth Circuit determined that "a person can commit second-degree manslaughter without using force or risking the intentional use of force," because the crime can be committed recklessly Id. at 616 Giving examples, the court explained that:

> A person can commit this crime by recklessly leaving a child alone with lit candles that later start a fire, by allowing a child to die of dehydration while in the person's care, by leaving explosives and blasting caps stored in an automobile where they are later ignited by the use of jumper cables, and, indeed, by driving drunk with 'culpable negligence' in a manner that causes the death of a passenger

Id. (internal citations omitted) Therefore, the court held, "the 'use of force,' as Leocal interpreted that phrase, is not an element of a second-degree manslaughter conviction," meaning that

the Minnesota second-degree manslaughter offense is not a crime of violence under § 16(a) Id. Turning to § 16(b), the court also held that second-degree manslaughter under Minnesota law does not "involve a risk that the perpetrator will intentionally use physical force in the course of committing the offense." Id. at 616-17 Because Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force or risking the intentional use of force, the Eighth Circuit held that it is not a crime of violence under § 16 Id. at 617

h. Ninth Circuit

In Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1123 (9th Cir 2006) (en banc), the Ninth Circuit held that a prior Arizona assault conviction did not constitute a crime of violence under § 16(a) because that federal statute "covers only those crimes involving intentional conduct," and thus the merely reckless use of force (as covered by the Arizona statute) was insufficient to establish a violation See also id. ("Because the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another, we conclude the federal statute does not apply ") In so holding, the court "agree[d] with [its] sister circuits that the reasoning of Leocal -- which merely holds that using force negligently or less is not a crime of violence --

extends to crimes involving the reckless use of force." Id. at 1129 The Ninth Circuit reasoned that Leocal emphasized that crimes of violence cannot be "'accidental '" Id. (quoting Leocal, 543 U S at 9) The court defined "accidental" as "'[n]ot having occurred as a result of anyone's purposeful act,'" and it defined "purposeful" as "'[d]one with a specific purpose in mind.'" Id. at 1129-30 (alterations in original) (citing Black's Law Dictionary 16, 1298 (8th ed. 2004)) The Ninth Circuit further concluded that "[r]eckless conduct, as generally defined, is not purposeful " Id. at 1130

"Even more clearly, reckless conduct as defined by Arizona law is not purposeful " Id. As support for this statement, the Ninth Circuit cited the Arizona criminal statute defining recklessness Id. Under that statute, "'[r]ecklessly' means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists " Ariz Rev Stat Ann § 13-105 (10)(c) That "risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation " Id. This definition of recklessness is substantially similar to the equivalent Maine definition, as well as the other definitions outlined in the chart in Part II(A)(1), supra For purposes of § 16, the Ninth Circuit saw no important differences

between negligence and recklessness, considering each mens rea to constitute the type of non-purposeful conduct that Leocal held was insufficient to establish a crime of violence involving the "use" of force Fernández-Ruiz, 466 F 3d at 1129-30 The court reasoned that the "plain meaning" of the word "use" denotes that "physical force is instrumental to carrying out the crime " Id. By contrast, the "subjective awareness" of risk that characterizes a reckless act "is not the same as the intentional use of physical force against the person of another " Id. The court further explained that "[t]he bedrock principle of Leocal is that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another " Id. at 1132 Therefore, the Ninth Circuit concluded that recklessness is not "a sufficient mens rea to establish that a conviction is for a crime of violence under § 16." Id. at 1130

i Tenth Circuit

In United States v Zúñiga-Soto, 527 F 3d 1110, 1113 (10th Cir 2008), the Tenth Circuit considered whether the "crime of violence" enhancement provision under U S S.G. § 2L1 2 applied to the appellant's prior Texas state conviction for assaulting a public servant Applying the commentary to this U S S.G provision, the Tenth Circuit's "sole task" was to whether the appellant's "prior felony conviction qualifies as a crime of violence because the offense had as an element the use of physical

force " Id. at 1115 Under the appellant's offense of conviction, a person commits an assault if he or she "intentionally, knowingly, or recklessly causes bodily injury to another " Tex Penal Code Ann § 22 01(a)(1) On appeal to the Tenth Circuit, the appellant argued that "his prior conviction did not have as an element the use of physical force because the Texas assault statute's mens rea component could be satisfied by recklessness " Zúñiga-Soto, 527 F 3d at 1115 The Tenth Circuit agreed, citing Leocal, its own precedent, and "the persuasive reasoning of [its] sister circuits " Id. at 1113, 1123

j Eleventh Circuit

Finally, applying similar reasoning, the Eleventh Circuit also relied on Leocal and the decisions of the other circuit courts to hold that "a conviction predicated on a mens rea of recklessness does not satisfy the 'use of physical force' requirement under [U S S.G.] § 2L1 2's definition of 'crime of violence '" United States v Palomino Garcia, 606 F 3d 1317, 1336 (11th Cir 2010) Citing "the near unanimity of the circuit courts on this issue," the Eleventh Circuit concluded that Leocal "plainly suggests that crimes requiring only a reckless[] disregard for the risk of physical injury to others are not crimes of violence " Id. at 1336 n 16 The Eleventh Circuit further explained that "[b]ecause Arizona law defines recklessness as nothing more than the conscious disregard of a substantial and unjustifiable risk, this is more

akin to negligence and cannot be said to require the intentional use of force " Id. at 1336 (internal citation omitted) Therefore, the court held that an Arizona conviction "predicated on the reckless causation of physical injury does not qualify as a crime of violence under [U S S.G.] § 2L1 2 " Id.

C Comparison of Analogous Statutory Language

As is evident from the discussion above, most of our sister circuits have held that the "use of physical force" requires the type of intentional conduct for which mere recklessness cannot suffice Although these cases involved different provisions than the Lautenberg Amendment, the statutory texts involved are not materially different, and in many cases, are virtually identical As referenced herein, analogous provisions to the definition of "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment are compared in the following chart:

Statute	Relevant Language
"misdemeanor crime of domestic violence," Lautenberg Amendment, 18 U S.C § 922(g)(9)	"has, as an element, the use or attempted use of physical force" 18 U S C § 921(a)(33)(A)
"crime of violence," 18 U S.C. § 16(a)	"has as an element the use, attempted use, or threatened use of physical force against the person or property of another" 18 U S.C. § 16(a)

"crime of violence," 18 U S C § 16(b)	"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" 18 U S C. § 16(b)
"[c]rime of violence," U S S G § 2L1 2	"[an] offense that has as an element the use, attempted use, or threatened use of physical force against the person of another" U S.S G. § 2L1.2, cmt 1(B)(iii)
"violent felony" under the ACCA, 18 U S C § 924(e)(1)	"has as an element the use, attempted use, or threatened use of physical force against the person of another" 18 U S C § 924(e)(2)(B)(I)

It is readily apparent that the language involved in most of the preceding provisions is nearly identical, and for present purposes is materially indistinguishable [16] Moreover, I do not

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[16] The majority claims that § 16(a) is "not analogous" to § 922(g)(9) Ante, at 12 I disagree, given that these two provisions contain nearly identical language Section 16(a) defines a "crime of violence," whereas § 922(g)(9) involves a "misdemeanor crime of domestic violence " The relevant definition for § 922(g)(9) is an offense that "has, as an element, the use or attempted use of physical force " 18 U S C § 921(a)(33)(A) The definition under § 16(a) is materially indistinguishable: an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another " Id. § 16(a) This definition differs only in the addition of the "threatened use" of physical force as an alternative, and the explanation that the force be used "against the person or property of another " The former difference (the inclusion of "threatened use") is neither implicated in the current case nor in any of the analogous precedents referenced herein The latter change appears to be largely a distinction without a difference, as it is difficult to contemplate how or why the "use of physical force" for purposes of § 922(g)(9) would mean force used in any way other than "against the person or property of another "

doubt that the Supreme Court was well aware that the cases it cited in Castleman's Footnote Eight involved different provisions, yet the Court nonetheless contrasted the holdings of our sister circuits in those cases with our holding in Booker before remanding the instant cases to us for reconsideration in light of Castleman. See Castleman, 134 S. Ct. at 1414 n. 8. Thus, to the Supreme Court, these cases and provisions were sufficiently analogous to justify the instant remand. Cf. Smith, 544 U.S. at 233 ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); Northcross v. Bd. of Educ. of Memphis City Sch., 412 U.S. 427, 428 (1973) (per curiam) (stating that "[t]he similarity of language" in two statutory provisions sharing "a common raison d'etre" constitutes "a strong indication that the two statutes should be interpreted pari passu"). The government and the majority fail to persuasively establish that the meaning of "the use . . . of physical force" in these various federal definitions of a "crime of violence" should be so similar in every other context, yet so different as to be outcome-determinative in the instant context. For those reasons, I find the foregoing precedent more persuasive than the majority opinion here. I thus agree with our sister circuits that the "use . . . of physical force" for a "crime of violence" requires the intentional,

and not merely reckless, employment of physical force I find this conclusion to be particularly true for the subsumed offense at issue in the instant case: the combination of a mens rea of "recklessness" with an actus reus of "offensive physical contact." Cf. Nason, 269 F 3d at 19 (stating that the mens rea requirement is one of two factors that "distinguish mere touchings from offensive physical contacts")

III Conclusion

Despite the foregoing precedent from the Supreme Court and our sister circuits, the majority opinion nonetheless seeks to hew to our prior decision in Booker and to resolve these cases, yet again, exactly as we did in Armstrong I and Voisine I With due respect, for the reasons explained above, I believe that the majority is wrong

The Lautenberg Amendment is premised upon grave concerns and laudable purposes, as articulated both by the Supreme Court in Castleman and by the majority in this case I share those concerns and strongly agree with those purposes However, a general agreement with those goals need not dictate the result here This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence Were our job so simple, it would be an easy matter to decide in favor of the government But that is not our role. Our judicial obligations preclude us from such results-oriented decisionmaking

Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends That is, does the language chosen by Congress -- the "use or attempted use of physical force" -- necessarily apply to all Maine misdemeanor assault convictions for recklessly causing offensive physical contact? Applying the relevant precedent to this question of statutory interpretation counsels that we answer this inquiry in the negative and resolve this appeal in favor of the defendants I conclude that the particular subsumed Maine offense at issue here, the reckless causation of offensive physical contact, does not necessarily require the "use of physical force" and thus does not categorically constitute a misdemeanor crime of domestic violence under the Lautenberg Amendment

For the reasons stated herein, I would reverse the defendants' convictions Indeed, I believe that the Supreme Court has obligated us to do so Therefore, I respectfully dissent.

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

ERRATA SHEET

The opinion of this Court issued on January 30, 2015, is amended as follows:

On page 6, line 17, "App'x." is changed to "App'x"

On page 7, line 14, "App'x." is changed to "App'x"

On page 21, lines 15 and 24, the quotation marks are removed.

On page 22, footnote 4, line 7, "statue" is changed to "statute"

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

ERRATA SHEET

The opinion of this Court issued on January 30, 2015, is amended as follows:

On page 12, line 11, add "To begin, § 16(a) prohibits 'use of physical force against the person or property of another,' language crucial to the Supreme Court's holding in Leocal but absent from the definition at issue here See Leocal, 543 U.S at 8-10 "

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants.

Before

Lynch, Chief Judge,
Torruella, Stahl, Howard, Thompson, Kayatta and Barron,
Circuit Judges.

ORDER OF COURT
Entered: March 31, 2015

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

TORRUELLA, Circuit Judge, Dissenting. I dissent from the denial of en banc hearing, as I believe that this case meets our standards for rehearing for a conflict of law, and for the reasons explained in my dissent to the panel opinion.

By the Court:
/s/ Margaret Carter, Clerk

cc: Ms. Bunker, Ms. Malone, Mr. Lowell, Ms. McGaughey & Ms. Villa

U.S. Department of Justice

Federal Bureau of Investigation

Clarksburg, WV 26306
August 13, 2013

Stephen C. Smith, Esq
Smith Law Offices P.A.
[redacted]
Bangor, ME 04401

SUBJECT: Firearm Denial Appeal
National Instant Criminal Background Check System (NICS) Transaction Number (NTN) - [redacted]
Voluntary Appeal File (VAF)
Mr J[redacted] A[redacted] W[redacted]

Dear Mr Smith:

The fingerprints you submitted on behalf of your client, Mr. J[redacted] A[redacted] W[redacted], are identical with those in a record that was used to initially deny his firearm purchase or pawn redemption. A copy of your client's FBI identification record is enclosed. Based on further review and investigation, we have verified that your client's FBI identification record currently reveals one potentially prohibitive arrest lacking the necessary information to apply a determination regarding firearm eligibility, specifically the elements of the charge for which your client was convicted.

The Appeal Services Team (AST) of the FBI Criminal Justice Information Services (CJIS) Division's NICS Section was unable to obtain the necessary information for one arrest contained on the record that was used as the basis for Mr. W[redacted]'s denial. Consequently, although the original prohibitive information has been resolved, potentially prohibitive information exists on your client's record Therefore, unless the appropriate documentation is submitted and/or your client's record is updated, any future firearm transactions will be subject to a delay You may wish to contact the court agency which adjudicated your client's charge

and seek to ensure the information contained in the Interstate Identification Index (III) is accurate and complete The name and location of the court agency is as follows:

Maine District Court
Division of Bangor
73 Hammond Street
Bangor, ME 04401
Date of Arrest: [redacted], 2005
Court Case Number: BANDC-CR-2005-[redacted]

Pursuant to Title 17-A Maine Revised Statutes Annotated (M.R.S.A.), Section 501, "A person is guilty of disorderly conduct if:

> 2. In a public or private place, he knowingly accosts, insults, taunts or challenges any person with offensive, derisive or annoying words, or by gestures ***or other physical conduct***, which would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so accosted, insulted, taunted or challenged; or

Please be advised the charge itself does not have to include the words "domestic violence" to meet the misdemeanor crime of domestic violence definition. The verbiage under 17-A M.R.S.A. §501(2), stating " or other physical conduct", would meet criteria under Title 18, United States Code (U.S.C.), Section 922(g)(9), for the use or attempted use of physical force However, the NICS Section was unable to determine the specific type of "conduct" under 17-A M.R.S.A. §501(2), for which your client was convicted by the Bangor District Court. In the absence of this required information, the AST is unable to determine your client's firearm eligibility.

With regard to the November 2, 2005, date of arrest, when the NICS Section contacts all necessary agencies and still cannot obtain definitive information regarding an arrest, then the individual has the option of submitting a notarized written statement/affidavit of recollection of the circumstances. The submission received by the NICS Section serves as evidence and must include all details surrounding the arrest, the charges, the level of the crime/conviction, and the victim's relationship. If during any future firearm background checks, it is discovered the submission contains inaccurate details about the problematic arrest, the individual may be subject to criminal prosecution.

Stephen C Smith, Esq.

The FBI, as custodian of arrest information submitted voluntarily by local, state, tribal, and federal law enforcement agencies, is without authority to effect any changes in such records unless notified to do so by an authorized criminal justice agency Any request for the modification of such information must be received from the agency which originally submitted it, a court with jurisdiction over the agency's records, or state identification bureau having authority to modify arrest record entries for the entire state.

Please be advised, when conducting a future firearm background check, the NICS Section is required to delay the transaction and research every charge which, if supported by a conviction, could subject the record holder to firearm prohibitions under the Gun Control Act of 1968 If the NICS Section is unable to obtain conclusive disposition information and provide a final determination of either proceed or deny to the Federal Firearms Licensee (FFL) **within three business days, the FFL is not prohibited from transferring the firearm; however, the FFL is not required to do so**. The NICS Section places transactions which have not received a final determination in an open status for the current retention period set by federal regulations

Unless the arrest record is removed from the III or is updated by the submitting agency, future transactions may continue to be delayed based upon a name match with an arrest record

Additionally, the AST has determined your client is currently **not eligible** to be entered into the VAF due to the potential federal prohibitor previously mentioned.

NICS Section
CJIS Division

Enclosure

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

[redacted] ICN [redacted]

THE FOLLOWING FBI IDENTIFICATION RECORD FOR [redacted] IS FURNISHED FOR OFFICIAL USE ONLY

DESCRIPTORS ON FILE ARE AS FOLLOWS:

NAME W[redacted], J[redacted] A[redacted]

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR
[redacted]	[redacted]	1983/[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

BIRTH CITY
UNREPORTED

BIRTH PLACE
MASSACHUSETTS

CITIZENSHIP
UNITED STATES

PATTERN CLASS
[redacted]

OTHER BIRTH DATES	SCARS-MARKS-TATTOOS	SOCIAL SECURITY	MISC NUMBERS
NONE	NONE	[redacted]	NONE

ALIAS NAME(S)
NONE

END OF COVER SHEET

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

[redacted] ICN [redacted]

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- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME	FBI NO.	DATE REQUESTED
W[redacted].J[redacted] A[redacted]	[redacted]	2013/[redacted]

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR
[redacted]	[redacted]	1983/[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

BIRTH PLACE
MASSACHUSETTS

PATTERN CLASS
[redacted]

CITIZENSHIP
UNITED STATES

1-ARRESTED OR RECEIVED 2005/[redacted] SID-[redacted]
AGENCY-POLICE DEPARTMENT ORONO (ME[redacted])
AGENCY CASE-05-064906
CHARGE 1-DOMESTIC ASSAULT

COURT-
CHARGE-DISORDERLLY CONDUCT 17-A 501(2) CLASS E
SENTENCE-
[redacted]-2005 PLEA GUILTY FOUND GUILTY $400 FINE 10% GOV'T OPERATION SURCHARGE FUND $40 $10 VICTIMS COMPENSATION FUND 100% GENERAL FUND $400 4% MAINE CRIMINAL JUSTICE ACADEMY $16 1% COUNTY JAIL $4 5% GENERAL FUND ADDLT 5% SURCHARGE $20 TOTAL DUE $490

RECORD UPDATED 2007/[redacted]

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

RECORD AND BRIEFS

ORIGINAL

Supreme Court, U.S.
FILED
SEP - 9 2015
OFFICE OF THE CLERK

No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

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QUESTIONS PRESENTED

1. Whether petitioners' Maine convictions for misdemeanor domestic violence assault and misdemeanor assault against a domestic partner qualify as "misdemeanor crime[s] of domestic violence" for purposes of 18 U.S.C. 922(g)(9), which prohibits the possession of firearms by persons who have previously been convicted of a misdemeanor crime of domestic violence.

2. Whether Section 922(g)(9), as applied to petitioners, violates the Second Amendment.

3. Whether Section 922(g)(9), as interpreted in United States v. Hayes, 555 U.S 415 (2009), violates the Commerce Clause, the Ex Post Facto Clause, the Fifth Amendment, or the Sixth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 14-10154

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet App. A1-A98) is reported at 778 F.3d 176 A prior opinion of the court of appeals in petitioner Armstrong's case is reported at 706 F.3d 1 A prior opinion of the court of appeals in petitioner Voisine's case is not published in the Federal Reporter but is reprinted at 495 Fed. Appx. 101

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2015 A petition for rehearing was denied on March 31, 2015

(Pet App. B1). The petition for a writ of certiorari was filed on June 4, 2015. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1).

STATEMENT

Following conditional guilty pleas in the United States District Court for the District of Maine, petitioners were convicted of possessing firearms or ammunition, or both, after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Petitioner Voisine was also convicted of killing a bald eagle, in violation of 16 U.S.C 668(a). Petitioner Armstrong was sentenced to three years of probation. Petitioner Voisine was sentenced to one year and one day of imprisonment, to be followed by two years of supervised release The court of appeals affirmed petitioners' convictions in separate opinions. United States v. Armstrong, 706 F 3d 1 (1st Cir 2013); United States v. Voisine, 495 Fed. Appx. 101 (1st Cir 2013) (per curiam) (unpublished). This Court granted their joint petition for a writ of certiorari, vacated the judgments, and remanded to the court of appeals for further consideration in light of United States v. Castleman, 134 S. Ct. 1405 (2014). See 134 S. Ct. 1759 (2014) The court of appeals again affirmed. Pet App. A1-A98

1 Under 18 U S C 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor

crime of domestic violence to * * * possess in or affecting commerce, any firearm or ammunition." Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law -- committed by a person with a specified domestic relationship with the victim -- that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(i) and (ii); see United States v. Hayes, 555 U.S. 415, 420-421 (2009). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U S C 924(a)(2)

2. a. In 2002, petitioner Armstrong was convicted of assaulting his wife Pet App. A5. According to a police report, several years later, in 2008, Armstrong pushed his wife and hit her "hard" during an argument, leaving a "red mark." 706 F.3d at 2; Armstrong C.A. App. 75, 95. He was charged in Maine state court with misdemeanor domestic violence assault, in violation of Section 207-A(1)(A), which punishes any person who "violates section 207" if "the victim is a family or household member " Me. Rev. Stat Ann. tit 17-A, § 207-A(1)(A) (2006 & Supp. 2014). See Pet. App. A4-A5 Section 207, in turn, provides that "[a] person is guilty of assault if" he "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev Stat

Ann. tit 17-A, § 207(1)(A) (2006); see Pet. App. A4 The state charging document alleged that Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to his wife. Armstrong C.A. App. 33. Armstrong pleaded guilty to that offense and was sentenced to 180 days of imprisonment, with all but 24 hours suspended, and one year of probation. Id. at 40.

In May 2010, Maine police officers searched Armstrong's home and found six firearms and ammunition. Pet. App. A5. In April 2011, a federal grand jury in the District of Maine charged Armstrong with one count of possessing firearms and ammunition by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Armstrong C.A. App. 11-12

Armstrong moved to dismiss the indictment, arguing that a conviction under Maine's domestic violence assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." See Armstrong C.A. App. 13-14, 20-31. Armstrong also argued that if his prior conviction constitutes a misdemeanor crime of domestic violence, then Section 922(g)(9) violates the Second Amendment Id. at 13-20 The district

court denied the motion, see Pet. App. A6, and Armstrong thereafter entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss, Armstrong C.A. App. 49, 53. During the plea colloquy, the district court explained, and Armstrong acknowledged, that he would "not be able to raise * * * on appeal" any "other legal issues that * * * ha[d] not been raised" in his motion to dismiss. Id. at 56-57; see id. at 62-63. The district court sentenced Armstrong to three years of probation. Pet. App. A6 n.1.

b. In June 2003, petitioner Voisine was charged in Maine state court with simple assault, in violation of Section 207(1)(A). Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006); see Voisine C.A. App. 33. The state charging document alleged that Voisine "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to" his girlfriend and that "[t]he crime involved domestic violence." Voisine C.A. App. 33 According to a police report, Voisine's girlfriend had called 911 early one morning. Id. at 43. When a police officer arrived at the residence that Voisine and his girlfriend shared, his girlfriend told the officer that Voisine was drunk, that he "had slapped her in the face," and that "this was not the first time it happen[ed]." Ibid. The daughter of Voisine's girlfriend said she heard the slap from another room and found her mother lying on the floor Ibid. Voisine pleaded guilty to

the charged offense and was ordered to pay a $200 fine Id. at 30.

In November 2009, an anonymous caller contacted Maine authorities to report that Voisine had shot an eagle. Game wardens investigated and discovered that a bald eagle had been shot and killed with a rifle in an area where Voisine had been working. Voisine was found in possession of the rifle and eventually admitted that it was his and that he had shot the eagle. Voisine C.A. App. 53; see id. at 75-77.

In March 2011, the government filed an information charging Voisine with one count of possessing a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U S.C. 922(g)(9), and one count of killing a bald eagle, in violation of 16 U.S.C. 668(a) Voisine C.A. App. 10-11 Voisine moved to dismiss the first count, arguing that a conviction under Maine's simple assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." See id. at 12, 19-27. Voisine also argued that if his Maine conviction constitutes a misdemeanor crime of domestic violence, then Section 922(g)(9) violates the Second Amendment Id. at 13-19 The district court denied the

motion, see Pet. App. A6, and Voisine thereafter entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss, Voisine C.A. App. 51-52, 62. During the plea colloquy, the court explained, and Voisine acknowledged, that he would "have no right of appeal * * * except [on] the issues that [he] ha[d] already raised." Id. at 73; see id. at 73-75. The court sentenced Voisine to one year and one day of imprisonment, to be followed by two years of supervised release. Pet. App. A6 n.1.

3 On appeal, petitioners renewed the arguments set forth in their motions to dismiss. Armstrong C.A. Br. 9-24, 37-44; Voisine C.A. Br. 9-24, 36-42 They also raised a due process objection for the first time, claiming that they had been deprived of a sufficient forum for litigating the issue of whether they had "engaged in any violent act" severe enough to disarm them. Armstrong C.A. Br 36; see id. at 30-37; Voisine C.A. Br 29-36 The court of appeals affirmed petitioners' convictions in separate opinions

a The court of appeals affirmed Armstrong's conviction in a published decision. 706 F 3d at 2-8 Relying primarily on its prior decisions in United States v Booker, 644 F 3d 12 (1st Cir 2011), cert denied, 132 S. Ct 1538 (2012), and United States v Nason, 269 F.3d 10 (1st Cir 2001), the court rejected each of Armstrong's arguments.

The court of appeals first considered Armstrong's argument that a conviction under Maine's domestic violence assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." 706 F.3d at 3-6. The court explained that it had held in Booker "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)." Id. at 4 (quoting Booker, 644 F.3d at 21). And, in Nason, it had held that the phrase "physical force" was "broad enough to encompass the 'offensive physical contact' variant of Maine's assault statute." Ibid. (citing Nason, 269 F.3d at 16, 20-21) The court then explained that this Court's decision in Johnson v United States, 559 U S. 133 (2010), did not change the analysis, because "Johnson explicitly avoided deciding the question at issue here." Armstrong, 706 F.3d at 6 (citing Johnson, 559 U.S. at 143-144). Accordingly, the court concluded that Section 922(g)(9) "on its face, its legislative history and this court's precedent do not distinguish between 'violent' or 'non-violent' misdemeanor convictions when they involve the kind of conviction at issue here " Ibid.

The court of appeals also rejected Armstrong's Second Amendment challenge to Section 922(g)(9) Armstrong, 706 F.3d at 7-8. The court explained that, in Booker, it had rebuffed a similar challenge to Section 922(g)(9) after finding a "substantial relationship between [Section] 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and the governmental interest in preventing gun violence in the home." Id. at 7 (quoting Booker, 644 F.3d at 25). The court explained that Armstrong's "attempt[] to distinguish" his case from Booker by characterizing his challenge as "as-applied" rather than "facial" was unavailing. Ibid. The court noted that while it "ha[d] not adopted intermediate scrutiny as the appropriate type of review for" such a challenge, Armstrong's claim would fail "under any standard" because "a sufficient nexus exists here between the important government interest" (i.e., "preventing domestic gun violence") and "the disqualification of domestic violence misdemeanants like [Armstrong] " Id. at 7-8 (citation omitted).

Finally, the court of appeals reviewed Armstrong's due process challenge for plain error 706 F 3d at 6 The court found "no error, let alone plain error," because there was no "requirement that the government * * * prove the degree of violence inherent in the underlying domestic misdemeanor conduct of a defendant charged under" Section 922(g)(9) Ibid.

b. The court of appeals affirmed Voisine's Section 922(g)(9) conviction in an unpublished, per curiam decision. 495 Fed. Appx. at 101-102. Finding "no pertinent factual differences distinguishing the instant case from Armstrong," the court "incorporate[d] its reasoning." Id. at 102.

4. Armstrong and Voisine filed a joint certiorari petition in this Court, seeking review of their statutory, Second Amendment, and due process claims In March 2014, this Court (134 S. Ct. at 1759) granted certiorari, vacated the judgments in both cases, and remanded to the court of appeals "for further consideration in light of United States v. Castleman," 134 S. Ct. at 1405.

5. On remand, a divided panel of the court of appeals again affirmed petitioners' convictions Pet. App. A1-A98.

a. First, the court of appeals concluded that petitioners' Maine convictions for misdemeanor domestic violence assault and misdemeanor assault against a domestic partner qualified as "misdemeanor crime[s] of domestic violence" for purposes of 18 U S.C 922(g)(9). Pet App. A8-A25 The court pointed out that, in Castleman, this Court addressed "whether the phrase 'use of physical force' in [Section] 921(a)(33)(A) require[s] violence or [can] be satisfied by offensive touching " Id. at A7 Castleman, the court noted, "resolved the question in agreement with Nason, holding that Congress

incorporated the common-law meaning of 'force' -- namely, offensive touching -- in [Section] 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence '" Id. at A7-A8 (some internal quotation marks omitted) (quoting Castleman, 134 S. Ct. at 1410).

The remaining question was whether, after Castleman, "the Maine [assault] statute -- including the reckless acts it prohibits -- categorically fits within [Section] 922(g)(9)." Pet. App A9. The court of appeals answered that question in the affirmative. Id. at A9-A25. In doing so, it repeatedly emphasized the "unique nature of [Section] 922(g)(9)." Id. at A2; see id. at A10, A15. "[C]ontext matters," the court observed, and unlike other statutes that incorporate the phrase "use of physical force," Section 922(g)(9) is aimed at "domestic violence," which is "a term of art that encompasses a range of force broader than that which constitutes 'violence' simpliciter, including acts that might not constitute 'violence' in a nondomestic context." Id. at A9, A12 (some internal quotation marks omitted) (quoting Castleman, 134 S. Ct. at 1411 & n.4) The court relied on Section 922(g)(9)'s drafting history as well in concluding that the statute is "broader" than 18 U S C. 16, which is directed at the use of force in a nondomestic context Pet App A12-A13 (quoting Booker, 644

F.3d at 19, which recognized that "Congress expressly rejected" the Section 16(a) definition when drafting Section 922(g)(9)).

The court of appeals acknowledged (Pet. App. A8) that Castleman, in a footnote, cited decisions from other circuits that suggested "merely reckless causation of bodily injury * * * may not be a 'use' of force" (134 S. Ct. at 1414 & n.8). But the court emphasized that Castleman "did not say" that the First Circuit's prior holding in Booker -- that an offense with a mens rea of recklessness may qualify as a Section 922(g)(9) predicate -- "was wrong." Pet. App. A8. The court also pointed out that none of the recklessness decisions cited in Castleman addressed Section 922(g)(9); rather, most of them construed Section 16 and Sentencing Guidelines § 2L1.2(b)(1). Pet. App. A10-A13 & n.3. The court noted that only one case arose in "the domestic violence context," and that case addressed 8 U.S.C. 1227(a)(2)(E)(i), a statute that incorporates Section 16's definition of a "crime of violence" instead of Section 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence " Pet App. A13 (citing Fernandez-Ruiz v Gonzales, 466 F.3d 1121, 1124 (9th Cir 2006) (en banc)).

Turning to Maine law, the court of appeals emphasized that "Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent," inasmuch as "[t]he statutory definition requires that a person 'consciously

disregard[] a risk that the person's conduct will cause' the result " Pet. App. A18 (quoting Me Rev Stat. Ann. tit. 17-A, § 35(3)(A) (Supp. 2014)). Moreover, the court pointed out, "[t]he disregard of the risk is 'viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person.'" Ibid. (quoting Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(C) (Supp. 2014)). Because of these "volitional component[s]," id. at A20, the court concluded that "[r]eckless assaults in Maine" categorically constitute "misdemeanor crime[s] of domestic violence" under Section 922(g)(9), which extends to "scenarios without clear intent," id. at A18, A21; see id. at A18 (noting that Section 922(g)(9)'s sponsor, Senator Lautenberg, suggested the statute would apply to "scenarios * * * in which domestic arguments 'get out of control,' 'the anger will get physical,' and one partner will commit assault 'almost without knowing what he is doing'") (quoting 142 Cong Rec. 26674 (1996)).

The court of appeals cautioned that it was "not decid[ing] that recklessness in the abstract is always enough to satisfy [Section] 922(g)(9)." Pet App. A24 Rather, the court "decide[d] only that the Maine definition is sufficiently volitional that it falls within the definition of 'use of physical force' applied in [Section] 922(g)(9) " Ibid.; see id.

at A3 (emphasizing the "narrow[]" scope of the court's ruling); id. at A27 ("The question before us is a narrow one.").

b. The court of appeals also rejected petitioners' "renew[ed]" Second Amendment claim, finding it "foreclosed" by the court's prior decisions in Booker, 644 F.3d at 22-26, Armstrong, 706 F.3d at 7-8, and United States v. Carter, 752 F.3d 8, 12-13 (1st Cir. 2014). Pet. App. A25.

c. Finally, the court of appeals rejected (Pet. App. A25-A27) a claim petitioners raised for the first time after Castleman in their joint supplemental brief: that Section 922(g)(9), as interpreted in Hayes, supra, violates the Ex Post Facto Clause and the Fifth and Sixth Amendments. Pet. Supp. C.A. Br. 30-33. Hayes held that a "domestic relationship, although it must be established beyond a reasonable doubt in a [Section] 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." 555 U.S. at 418 According to petitioners, Section 922(g)(9), so construed, is an ex post facto law and violates the right to a jury trial because "the defendant cannot have been 'convicted' of the [Section 922(g)(9) predicate] until a jury so finds," and "[t]hat finding will not occur until after the conduct (possession of a firearm) has been completed." Pet Supp. C.A. Br 32

The court of appeals stated that, because petitioners' new constitutional claim was "outside the scope of [this] Court's

remand," Pet App. A25, petitioners had to demonstrate that consideration of the claim was "necessary to avoid extreme injustice," id. at A26 (citation omitted) The court reasoned that there could be no extreme injustice where Hayes had "already rejected arguments very similar to" petitioners' new claim. Ibid. (citing Hayes, 555 U.S. at 421). The court also concluded that Descamps v. United States, 133 S. Ct. 2276 (2013), did not "implicitly overrule[]" Hayes, as petitioners contended. Pet App. A26-A27. The court explained that whereas Descamps forbids courts from "evaluat[ing] the predicate conviction to determine a fact about it," the issue of whether a predicate conviction "involved a domestic relationship" for purposes of Section 922(g)(9) "is an element proved anew in the [Section] 922(g)(9) proceeding" itself Ibid.

d. Judge Torruella dissented. Pet. App. A28-A98 In his view, when this Court granted, vacated, and remanded "for further consideration in light of * * * Castleman," see 134 S Ct at 1759, it "implicitly suggest[ed]" that the court of appeals "bring [its] holdings in line with" the recklessness decisions that Castleman cited. Pet App. A28 (citing Castleman, 134 S. Ct. at 1414 n.8). Judge Torruella argued that the text of Section 922(g)(9) reinforced that conclusion, because it is "nearly identical" to "the operative language" of Section 16, under which "the 'use' of physical force requires

the active or intentional employment of force," not "merely reckless conduct." Id. at A29-A30 Judge Torruella also stated that, to the extent Section 922(g)(9) presents "a 'close' question" about recklessness, he would invoke the rule of lenity to "foreclose[] [petitioners'] convictions here " Id. at A31

ARGUMENT

Petitioners argue (Pet. 24-31) that convictions under Maine's assault statutes do not qualify as misdemeanor crimes of domestic violence for purposes of 18 U.S.C. 922(g)(9) because the Maine statutes can be violated by reckless as well as intentional conduct. The court of appeals correctly rejected that contention, and its decision does not conflict with United States v. Castleman, 134 S. Ct. 1405 (2014), or any decision of another court of appeals. Review of the statutory question is therefore not warranted.

Further review of the other questions presented is likewise unwarranted. The court of appeals correctly rejected petitioners' Second Amendment claim, which implicates no cognizable conflict of authority Petitioners' other constitutional claim -- that Section 922(g)(9), as construed in United States v. Hayes, 555 U.S. 415 (2009), violates the Commerce Clause, the Ex Post Facto Clause, and the Fifth and Sixth Amendments -- was not properly preserved in the courts below nor within the scope of this Court's remand for further

consideration in light of Castleman. In any event, that claim, too, lacks merit and implicates no conflict of authority.

1. Petitioners argue (Pet. 24-31) that convictions under Maine's assault statutes do not qualify as misdemeanor crimes of domestic violence for purposes of Section 922(g)(9) because the Maine statutes can be violated by reckless offensive contact as well as intentional conduct.[1] The court of appeals correctly rejected that argument, and its decision does not conflict with Castleman or any decision of another court of appeals.

a. The decision below is correct. As the court of appeals explained in United States v. Booker, 644 F.3d 12 (1st Cir 2011), cert. denied, 132 S. Ct. 1538 (2012), the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A) does not specify any required mens rea. 644 F.3d at 18, 20-21. "In common parlance, a 'use of physical force' may be described as reckless or intentional " Id. at 18

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[1] Under Maine law, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Me Rev Stat Ann. tit. 17-A, § 35(3)(A) (2007) "[T]he disregard of the risk" is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person," and it "must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C) Maine courts have interpreted "offensive physical contact" to mean "something less than bodily injury," but "more than a mere touching of another " United States v Nason, 269 F 3d 10, 19 (1st Cir 2001) (quoting State v Pozzuoli, 693 A.2d 745, 747 (Me 1997))

(citation omitted); cf. Leocal v. Ashcroft, 543 U S. 1, 9, 13 (2004) (concluding that the phrase "use . . . of physical force against the person or property of another" in 18 U.S.C. 16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct," but reserving judgment as to recklessness).

That conclusion is consistent with the "more specialized legal usage" of the phrase "use of physical force" to describe the common-law crime of battery. Johnson v. United States, 559 U.S. 133, 139-140 (2010). The crime of battery has traditionally encompassed both intentional and criminally negligent or reckless infliction of harm. See 2 Wayne R. LaFave, Substantive Criminal Law § 16.2(c)(2), at 557 (2d ed. 2003) (LaFave); see also, e.g., Commonwealth v. Hawkins, 32 N.E. 862, 863 (Mass 1893) (holding that a reckless shooting qualifies as a battery; explaining that if the victim "had died from the pistol shot, the defendant, on the facts found by the jury, would have been guilty of manslaughter As she survived the injury, the same principle now requires a conviction of assault and battery"). Consistent with that background, "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness " LaFave § 16 2(c)(2), at 557; cf Model Penal Code § 211 1(a) (1985) ("A person is guilty of assault if he

* * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another.").[2] Here, where Congress has employed the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence," see Castleman, 134 S. Ct. at 1411, the most natural conclusion is that Congress intended to include battery crimes, like the Maine assault offenses at issue in this case, that punish "volitional" conduct involving a "conscious[] disregard[]" of the risk involved, Pet. App. A18, A20 (second set of brackets in original; emphasis omitted) (quoting Me. Rev Stat. Ann. title 17-A, § 35(3)(A) (Supp. 2014)).

b. Contrary to petitioners' contention (Pet 25-27), the decision below is consistent with Castleman. There, the Court considered whether the defendant's misdemeanor conviction, under Tennessee law, of having "intentionally or knowingly cause[d] bodily injury to the mother of his child" qualified as a "misdemeanor crime of domestic violence" under Section 922(g)(9) 134 S. Ct. at 1408 (citation and internal quotation

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[2] In Johnson, the Court described common-law battery as "the intentional application of unlawful force against the person of another " 559 U S. at 139 As LaFave explains, while some courts have spoken of criminal batteries as necessarily involving "intent" to injure, they have also treated reckless or criminally negligent conduct as supplying the necessary intent See LaFave § 16 2(c)(2), at 556 & n.32; see also Rollin M. Perkins, Non-Homicide Offenses Against the Person, 26 B.U L. Rev 119, 125-126 (1946)

marks omitted). At the outset of its analysis, the Court held that Section 921(a)(33)(A)'s inclusion of the phrase "use of physical force" "incorporates the common-law meaning of 'force' -- namely, offensive touching." Id. at 1410. Distinguishing 18 U.S.C. 924(e)(1), which applies to "violent felon[ies]," and 18 U.S.C 16, which applies to "crime[s] of violence," the Court emphasized that Section 922(g)(9) extends to "[d]omestic violence." 134 S. Ct. at 1410-1411 & n.4. And "[d]omestic violence," the Court explained, is "not merely a type of 'violence'" but rather "a term of art" that "encompasses a range of force broader than that which constitutes violence simpliciter " Ibid. Taking those precepts together, the Court concluded that the defendant's Tennessee offense qualified as a "misdemeanor crime of domestic violence" under Section 922(g)(9) Id. at 1416.

In reaching that conclusion, the Court reserved the question of whether a conviction with a mens rea of recklessness could qualify as a Section 922(g)(9) predicate Castleman, 134 S. Ct at 1414. In dicta, however, the Court noted that "the merely reckless causation of bodily injury under" Tennessee law "may not be a 'use' of force," ibid., and it cited in a footnote several court of appeals decisions holding that recklessness is not a "use of force" under Section 16 and Sentencing Guidelines § 2L1 2(b)(1), id. at 1414 n.8

As the court of appeals pointed out (Pet. App A8), Castleman did not resolve the question presented here or otherwise abrogate the First Circuit's prior decision in Booker, which held that "an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)." 644 F.3d at 21. And for at least two reasons, it would not be appropriate to read Castleman's mere citation of cases arising under 8 U.S.C. 1227(a)(2)(E)(i), 18 U.S.C 16, and Sentencing Guidelines § 2L1.2(b)(1) as an implicit conclusion that an offense with a mens rea of recklessness may never qualify as a misdemeanor crime of domestic violence under Section 922(g)(9). First, Castleman itself distinguished Section 922(g)(9) from those other provisions on the ground that "'[d]omestic violence' is not merely a type of 'violence'" but rather "a term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter." 134 S. Ct. at 1411 & n.4.

Second, the recklessness question was not squarely presented in Castleman, because the relevant portion of the Tennessee statute prohibited "intentionally or knowingly caus[ing] bodily injury " 134 S Ct at 1409 (citation omitted) The parties thus did not brief the recklessness question. See U.S. Br. at 8 n.5, Castleman, supra (No. 12-1371) ("Because respondent was specifically charged with and convicted

of the intentional or knowing causation of bodily injury * * * , the question whether 'reckless' conduct is included within the definition of a 'misdemeanor crime of domestic violence' is not presented.") [3]

c. Nor, finally, does the decision below implicate any conflict among the circuits about the scope of Section 922(g)(9). As the court of appeals detailed (Pet. App. A11 n.3, A13-A15), each of the decisions petitioners cite in support of their claim of a conflict (Pet. 27-31) involved a provision other than Section 922(g)(9) and thus did not address the meaning of a "misdemeanor crime of domestic violence" as Section 921(a)(33)(A) "unique[ly]" defines that term. See United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (Sentencing Guidelines § 2L1.2(b)(1)); Jimenez-Gonzalez v

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[3] In his dissenting opinion below, Judge Torruella argued that when this Court granted, vacated, and remanded (GVR) in petitioners' case "for further consideration in light of * * * Castleman," Armstrong, 134 S. Ct. at 1759, it "implicitly suggest[ed]" that the court of appeals "bring [its] holdings in line with" the recklessness decisions that Castleman cited. Pet. App. A28 (citing Castleman, 134 S Ct at 1414 n.8). That is incorrect. As the court of appeals has elsewhere observed, "a GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." Gonzalez v Justices of Mun. Ct. of Boston, 420 F 3d 5, 7 (1st Cir 2005) (citing Tyler v. Cain, 533 U S. 656, 666 n 6 (2001); Henry v City of Rock Hill, 376 U S 776, 777 (1964) (per curiam)), cert denied, 546 U S 1181 (2006)

Mukasey, 548 F 3d 557, 559-563 (7th Cir. 2008) (18 U.S.C. 16); United States v. Zuniga-Soto, 527 F.3d 1110, 1123-1125 (10th Cir. 2008) (Sentencing Guidelines § 2L1.2(b)(1)); United States v. Torres-Villalobos, 487 F.3d 607, 613-617 (8th Cir 2007) (Section 16); United States v. Portela, 469 F.3d 496, 498-499 (6th Cir. 2006) (Sentencing Guidelines § 2L1.2(b)(1)); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1124-1132 (9th Cir. 2006) (en banc) (8 U.S.C. 1227(a)(2)(E)(i)); Garcia v. Gonzales, 455 F.3d 465, 467-469 (4th Cir. 2006) (18 U.S.C. 16); Oyebanji v. Gonzales, 418 F.3d 260, 263-265 (3d Cir. 2005) (18 U.S.C. 16); Jobson v. Ashcroft, 326 F.3d 367, 372-376 (2d Cir. 2003) (18 U S C 16); United States v. Chapa-Garza, 243 F.3d 921, 924-928 (5th Cir 2001) (18 U.S.C. 16).

Petitioners cite no court of appeals decision holding that an offense with a mens rea of recklessness may never qualify as a misdemeanor crime of domestic violence under Section 922(g)(9), nor do they cite a decision that has addressed the issue since Castleman. Under those circumstances, reviewing the issue now would be premature Cf Elonis v. United States, 135 S Ct 2001, 2013 (2015) (declining to consider "whether recklessness suffices for liability under Section 875(c)," where "[t]here was and is no circuit conflict over the question"). That is especially so given the modest scope of the decision below As the court of appeals emphasized, it did not purport

to hold "that recklessness in the abstract is always enough to satisfy [Section] 922(g)(9) " Pet. App. A24. Rather, the court "narrowly" held (id. at A3) that Maine's definition of recklessness "is sufficiently volitional that it falls within the definition of 'use of physical force' applied in [Section] 922(g)(9)" (id. at A24). The courts of appeals should be given additional time to consider whether and under what circumstances the same conclusion should apply to "the standard definitions of recklessness in [other] jurisdictions" besides Maine (Pet 28).

2. Petitioners further contend (Pet. 16-24) that, as applied to them, Section 922(g)(9) violates the Second Amendment That claim, too, implicates no conflict among the courts of appeals and does not warrant further review.

a Since this Court held in District of Columbia v. Heller, 554 U S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms, several courts of appeals have addressed the constitutionality of Section 922(g)(9) in published opinions, and none has held that the statute is unconstitutional See United States v Chovan, 735 F 3d 1127, 1139 (9th Cir 2013) (upholding statute), cert denied, 135 S Ct 187 (2014); Booker, 644 F 3d at 22-26 (same); United States v Skoien, 614 F 3d 638, 641-642 (7th Cir 2010) (en banc) (same), cert denied, 562 U.S 1303 (2011); United States v White, 593 F 3d 1199, 1205-1206 (11th Cir 2010)

(same); cf. United States v. Staten, 666 F.3d 154, 162-163, 167-168 (4th Cir 2011) (rejecting Second Amendment challenge after assuming arguendo that defendant was entitled to some degree of Second Amendment protection notwithstanding his conviction and relying on the degree of force required under the circuit's prior decision in United States v. White, 606 F.3d 144, 153 (4th Cir. 2010) ("violent force * * * capable of causing physical pain or injury") (citation and emphasis omitted)), cert. denied, 132 S. Ct. 1937 (2012).[4] Courts have also rejected Second Amendment challenges to 18 U.S.C. 922(g)(8), which prohibits possession of a firearm by a person subject to a domestic violence protective order. See United States v Chapman, 666 F 3d 220, 224-231 (4th Cir. 2012); United States v. Bena, 664 F 3d 1180, 1182-1185 (8th Cir. 2011); United States v. Reese, 627 F.3d 792, 799-805 (10th Cir. 2010), cert. denied, 131 S. Ct. 2476 (2011) This Court denied review of several of those decisions, including Booker, and the same result is warranted here.

b. In the decision below, the court of appeals held that petitioners' Second Amendment claim was "foreclosed" by (inter

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[4] See also In re United States, 578 F 3d 1195, 1200 (10th Cir 2009) (unpublished order in appendix) (indicating that Section 922(g)(9) is "presumptively lawful" under Heller) (citation omitted); cf People v Flores, 86 Cal Rptr 3d 804, 806-807 (Cal Ct App 2008) (rejecting Second Amendment challenge to state statute disarming violent misdemeanants)

alia) its earlier decision in Armstrong's case. Pet App. A25 (citation omitted). There, relying on Booker, supra, the court held that Armstrong's claim would "fail[]" under any level of scrutiny "because a sufficient nexus exists * * * between the important government interest" in "preventing domestic gun violence" and disarming misdemeanants who engage in physical force of the sort proscribed by the Maine assault statutes. 706 F.3d at 7-8 (quoting Booker, 644 F.3d at 25). That conclusion is supported by a substantial body of empirical evidence that "[f]irearms and domestic strife are a potentially deadly combination." Castleman, 134 S. Ct. at 1408 (quoting Hayes, 555 U.S at 427); see, e.g., id. at 1409 (citing evidence that "[w]hen a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed"); see also Staten, 666 F 3d at 163-167; Booker, 644 F 3d at 25-26; Skoien, 614 F.3d at 642-644 Restrictions on gun ownership by persons convicted of abusing their domestic partners bear a clear connection to the important goals underlying Section 922(g)(9).

c. Petitioners argue (Pet 16-23) that Section 922(g)(9) cannot constitutionally be applied to persons who have committed offenses involving reckless infliction of harm or to those involving offensive but "non-violent" physical contact. Petitioners, however, are not well-situated to raise that claim because both engaged in intentional violence against their

respective victims. See Armstrong C.A. App. 75, 95 (Armstrong hit his wife "hard" and left a "red mark."); Voisine C.A. App. 43 (Voisine slapped his girlfriend.). Nor can petitioners invoke the Second Amendment rights of other defendants not before the Court. The overbreadth doctrine has no place in a Second Amendment challenge to a criminal indictment. Cf , e.g., Sabri v. United States, 541 U.S. 600, 608-610 (2004) (explaining that overbreadth challenges are recognized only "in relatively few settings" supported by "weighty" and "specific reasons," and otherwise "are especially to be discouraged"); Skoien, 614 F.3d at 645 ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.").

But even if the overbreadth doctrine did apply here, it would not help petitioners Any claimant making an overbreadth challenge must show that the overbreadth is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." United States v. Williams, 553 U.S. 285, 292 (2008). Petitioners assert that "[t]here are many" Section 922(g)(9) defendants who have been convicted of "non-violent reckless offenses" and "have never physically harmed their loved ones" (Pet 20), but they cite no compelling empirical evidence to that effect

3. Finally, petitioners argue (Pet. 8-16) that Section 922(g)(9), as interpreted in Hayes, supra, violates the Commerce Clause, the Ex Post Facto Clause, and the Fifth and Sixth Amendments. But petitioners waived that claim by failing to preserve the objection as part of their conditional guilty pleas. See Fed. R. Crim. P. 11(a)(2) (stating that a conditional guilty plea permits a defendant to "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion"); United States v. Kingcade, 562 F.3d 794, 797 (7th Cir.) (stating that "[a]ll non-jurisdictional issues not specifically preserved in [a] conditional plea agreement are waived," and citing cases), cert. denied, 557 U.S. 945 (2009) The district court advised each petitioner during his change of plea hearing that, if he pleaded guilty, he would lose the right to appeal other legal issues that had not already been raised. See Armstrong C.A. App. 56-57, 62-63; Voisine C.A. App. 73.

Moreover, petitioners did not raise their present constitutional claim in their initial appeals Because this Court thereafter granted certiorari, vacated the court of appeals' judgments, and remanded solely "for further consideration in light of * * * Castleman," see 134 S Ct 1759, petitioners' claim is beyond the scope of the Court's remand and is not properly presented here The court of appeals concluded

as much, Pet. App. A26, and petitioners do not take issue with that record-bound procedural determination, or with the corollary conclusion that they must show that they would suffer "extreme injustice" absent consideration of their new constitutional claim, ibid.

In any event, even if petitioners had merely forfeited their present constitutional claim, review would be for plain error. See Fed. R. Crim. P. 52(b). Petitioners cannot demonstrate error, let alone plain error. They apparently ask the Court to overrule Hayes (Pet. 9), which held that a "domestic relationship, although it must be established beyond a reasonable doubt in a [Section] 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense " 555 U S at 418 According to petitioners, Section 922(g)(9), so construed, is an ex post facto law, violates the right to a jury trial, and exceeds Congress's authority[5] because "all persons with any misdemeanor assault conviction are banned

---

[5] In addition to being waived and beyond the scope of the Court's remand, petitioners' invocation of the Commerce Clause (Pet 15-16) faces another procedural hurdle: they did not raise a Commerce Clause challenge in their post-remand supplemental briefing, and the court of appeals did not consider how the Commerce Clause might bear on their present constitutional claim. That is another reason review would be inappropriate here See United States v Williams, 504 U.S 36, 41 (1992) (Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below") (citation omitted).

from possessing firearms * * * with no jury ever having found the necessary statutory elements" in a "contemporaneous proceeding in which to establish the prohibiting [domestic] element." Pet. 12-13; see Pet. Supp. C.A. Br. 32 ("[T]he defendant cannot have been 'convicted' of the [predicate] crime until a jury so finds," and "[t]hat finding will not occur until" a federal prosecution, "after the conduct (possession of a firearm) has been completed."). Petitioners also argue (Pet. 10) that Section 922(g)(9), as construed in Hayes, "conflicts with" Descamps v United States, 133 S. Ct. 2276 (2013).

The court of appeals correctly rejected petitioners' argument. Pet. App. A26-A27. As the court explained, Descamps forbids a sentencing court from "evaluat[ing] the predicate conviction to determine a fact about it," whereas the issue of whether a predicate conviction "involved a domestic relationship" for purposes of Section 922(g)(9) is not an element of the predicate conviction, but "is an element proved anew in the [S]ection 922(g)(9) proceeding" itself. Ibid. Nothing is unconstitutional about that procedure, and petitioners do not suggest that any court of appeals has held otherwise. Before criminal punishment may be imposed under Section 922(g)(9), a defendant is entitled to a jury determination on all the elements of the federal offense, including the fact that the prior conviction had a domestic

component. See Hayes, 555 U S. at 418. And no ex post facto problem exists, because a defendant knows, at the time he chooses to possess a firearm, that he is subject to criminal punishment under federal law if he has a qualifying prior state conviction with a domestic component. Cf. United States v. Brady, 26 F.3d 282, 291 (2d Cir.) (rejecting ex post facto challenge to Section 922(g)(1), because defendant was able to "conform his conduct to the requirements of the law" in effect at the time he committed the firearm offense), cert. denied, 513 U.S. 894 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

SEPTEMBER 2015

No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 9th day of September, 2015.

[See Attached Service List]

SUPREME COURT, U.S.
2015 SEP 10 P 3:00

Donald B. Verrilli, Jr.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

September 9, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

14-10154
VOISINE, STEPHEN AND WILLIE E. ARMSTRONG
USA

VIRGINIA G. VILLA
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RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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ORIGINAL

No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN VOISINE and
WILLIAM E. ARMSTRONG III, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

VIRGINIA G. VILLA
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The Solicitor General makes two new arguments in opposition. Both focus on issues of waiver. The first states that the constitutional questions, aside from the Second Amendment, are foreclosed because not preserved in the conditional plea agreements of the Petitioners. *See* Br. In Opp. at 16-17, 28. The second argument is that this Court's remand order to the First Circuit did not encompass the issue regarding whether *Descamps v. United States*, 133 S.Ct. 2276 (2013) renders Section 922(g)(9) unconstitutional as construed in *United States v. Hayes*, 555 U.S. 415 (2009). Both arguments find small support in the facts or the law.

As to the first argument, the relevant text of both guilty pleas are the same and read, "I reserve the right ... to have an appellate court review this court's decision ... denying my Motion to Dismiss Indictment." Both Motions to Dismiss challenged the Indictments based on the failure to state a federal offense, in that the listed conviction did not constitute a "misdemeanor crime of domestic violence," and that, if the statute were applied to these convictions, it was unconstitutional pursuant to the Second Amendment.

The additional constitutional questions arguably come within the appeal rights reserved in the Conditional Plea Agreements pursuant to *Griffin v. Kentucky*, 479 U.S. 314 (1987). *Griffin* established that new rules for the conduct of criminal prosecutions shall be applied to all cases pending on direct appeal. Petitioners raised their Fifth Amendment Due Process claims after the First Circuit issued its decision in *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012)(overruling prior interpretation of 18 U.S.C. § 922(g)(4) based on doctrine of constitutional

avoidance). The Government argued that Petitioners had waived the Due Process argument as not included in their Conditional Pleas. The First Circuit rejected the waiver argument and reviewed the Fifth Amendment claims under a plain error review. *See United States v. Armstrong*, 706 F.3d 1, 6 (1st Cir. 2013). This approach is consistent with both *Griffin, supra*, as well as *United States v. Kingcade*, 562 F.3d 794, 797 (7th Cir. 2009).

The Government also argues waiver of the *Descamps* claim as exceeding the scope of remand from this Court. The First Circuit indicated that the issue did not fall within the remand order. *See United States v. Voisine*, First Cir. No. 12-1213. slip op., at 26, Appx. The Government argued the scope of the remand order in its reply brief. The First Circuit's briefing order did not allow an opportunity to respond to this argument. A lack of opportunity to object does not constitute agreement.

Petitioners first raised the impact of *Descamps* in their initial Petition to this Court. The Government argued in opposition that the issue had been waived. The Court granted the Petition and remanded in light of *United States v. Castleman*, 134 S.Ct. 1405 (2015). The first time this Court unequivocally held that the categorical approach applies to Section 922(g)(9) was in *Castleman*. *See id.*, at 1413. In light of *Hayes*, *Castleman* may have held the categorical approach inapplicable. It did not. Questions regarding the application of the categorical approach to 18 U.S.C. § 922(g)(9) thus fall within the remand order.

There are many federal criminal statutory provisions, such as Section 924(e)(2)(B), which predicate certain repercussions based on prior convictions. To date, Section 922(g)(9) is the only one allowing a later conduct-specific inquiry into the facts underlying a prior conviction where the fact forms no part of the elements of the prior conviction. At least one justice of this Court has endorsed amplifying this procedure: "Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. *See Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct." *Johnson v. United States*, 135 S.Ct. 2551, 2580 (2015) (Alito, J, dissenting). This Petition highlights the possible multitudinous constitutional problems presented by allowing a fact-finder, including a jury, to find that a prior conviction involves an additional "component," *see* Br. In Opp. at 30-31, that formed no part of the original conviction. As the First Circuit addressed many of these issues on their merits, review of all the constitutional questions presented is appropriate.

Supreme Court Rule 10 lists a number of considerations that may trigger review by this Court. Many consist of conflicts between various tribunals. The Government advocates allowing the lower courts to address these questions in the

first instance. The conflicts noted by this Petition are either ones that the circuits have addressed (such as whether "use of physical force" encompasses reckless conduct) or are ones that arise because the statutory construction in *Hayes* is difficult to justify in light of the constitutional holding in *Descamps*. They are conflicts ripe for resolution by this Court.

Dated: September 14, 2015

Respectfully submitted,

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Counsel of Record

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Attorney for Petitioners

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2014

WILLIAM ARMSTRONG III and STEPHEN VOISINE,	)	No. 14-10154
Petitioners,	)	
v.	)	CERTIFICATE OF SERVICE
UNITED STATES OF AMERICA,	)	
Respondent.	)	

Virginia G. Villa states that all parties required to be served have been served and that one true and correct copy of the Petitioners' Reply to the Brief in Opposition was served on the persons listed below on the 14th day of September, 2015, by depositing one copy of the same with the United States Post Office, First-Class postage prepaid, addressed as follows:

Donald B. Verrilli, Jr.
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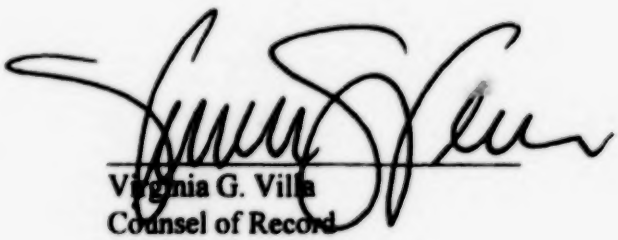

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Mr. Scott Harris
Clerk, Supreme Court of the U.S.
1 First Street N.E.
Washington, D.C. 20543

September 14, 2015

Re: Stephen Voisine and William Armstrong III v. United States
No. 14-10154

Dear Mr. Harris:

Enclosed for filing please find the following documents in the above referenced matters:

1. The original and ten copies of Petitioners' Reply to Brief in Opposition; and
2. Certificate of Service.

Sincerely,

VIRGINIA G. VILLA
Attorney for Petitioners

c: Donald B. Verrilli, Solicitor General
Stephen Voisine
William Armstrong III

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SUPREME COURT, U.S.

No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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* Counsel of Record

Additional counsel on inside front cover

December 17, 2015

PETITION FOR WRIT OF CERTIORARI FILED: JUNE 4, 2015
CERTIORARI GRANTED: OCT. 30, 2015

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U.S. DISTRICT COURT
DISTRICT OF MAINE (BANGOR)

Criminal Docket For Case #: 1:11-cr-00017-JAW-1

USA

v.

VOISINE

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
		* * *
03/11/2011	2	INFORMATION as to STEPHEN L VOISINE (1) count(s) 1, 2. (jlg) (Entered: 03/11/2011)
		* * *
03/15/2011	10	MOTION to Dismiss *Count I of the Information with Incorporated Memorandum* by STEPHEN L VOISINE Responses due by 4/5/2011. (Attachments: # 1 transcript of 2/2/04, # 2 complaint)(VILLA, VIRGINIA) Modified on 3/15/2011 to name attachments (bld). (Entered: 03/15/2011)
		* * *

DATE	NO.	DOCKET TEXT
04/14/2011	14	ORDER denying 10 Motion to Dismiss Count I of the Information as to STEPHEN L VOISINE (1). By JUDGE JOHN A. WOODCOCK, JR. (MFS) (Entered: 04/14/2011)
04/14/2011	15	NOTICE OF HEARING as to STEPHEN L VOISINE Change of Plea Hearing set for 5/17/2011 02:00 PM in Main Courtroom, Bangor before JUDGE JOHN A. WOODCOCK JR. The defendant will be required to identify every prescription medication he is taking and to specify the dosage and frequency, purpose and effects of the medication. (The same requirement applies to medications prescribed but NOT taken, with an additional requirement that the defendant explain why it was not taken and the consequences of the failure to take it.) Failure to do so satisfactorily may result in the judges refusal to accept the plea. Counsel may find it convenient to use a written list for this purpose. Counsel shall file the prosecution version and any plea agreement at least 2 business days prior to the change of plea. (Check for Receipt of Prosecution Version and any Plea Agreement on 5/13/2011.) (jgw) (Entered: 04/14/2011)

* * *

DATE	NO.	DOCKET TEXT
06/13/2011	24	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR: Change of Plea Hearing held as to STEPHEN L VOISINE, Conditional Guilty Plea entered as to Count 1; Guilty plea entered as to Count 2; Plea accepted. Conditional Plea signed. Defendant released on same bail conditions. (Court Reporter: Julie Edgecomb) (jlg) (Entered: 06/13/2011)
06/13/2011	25	CONDITIONAL PLEA as to STEPHEN L VOISINE. (jlg) (Entered: 06/13/2011)
		* * *
02/13/2012	41	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR: Sentencing held on 2/13/2012 as to STEPHEN L VOISINE. Defendant sentenced to 12 months and 1 day on Count 1 and 9 months imprisonment on Count 2 to be served concurrently; 2 years supervised release on Count 1 and 1 year supervised release on Count 2; $125.00 special assessment. Defendant released on same bail conditions and to self-report on March 30, 2012. (Court Reporter: Julie Edgecomb) (jlg) (Entered: 02/13/2012)
		* * *

DATE	NO.	DOCKET TEXT
02/14/2012	43	JUDGMENT as to STEPHEN L VOISINE (1), Count(s) 1, 2, Defendant sentenced to 12 months and 1 day on Count 1 and 9 months imprisonment on Count 2 to be served concurrently; 2 years supervised release on Count 1 and 1 year supervised release on Count 2; $125.00 special assessment. Defendant to self-report. By JUDGE JOHN A. WOODCOCK, JR. (jlg) (Entered: 02/14/2012)
02/15/2012	44	NOTICE OF APPEAL by STEPHEN L VOISINE. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from our web site at http://www.med.uscourts.gov/operations/forms/transcript order.pdf MUST be completed and submitted to the Court of Appeals. NOTICE TO COUNSEL: Counsel should register for a First Circuit CMECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel should also review the First Circuit requirements for electronic filing by visiting the CMECF Information section at http://www.ca1.uscourts.gov/efiling.htm. (VILLA, VIRGINIA) (Entered: 02/15/2012)

* * *

DATE	NO.	DOCKET TEXT
01/18/2013	52	OPINION of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment,, Check for Receipt of Mandate on 2/19/2013. (jgw) (Entered: 01/22/2013)
01/18/2013	53	JUDGMENT of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment (jgw) (Entered: 01/22/2013)
02/21/2013	54	MANDATE of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment. (jlg) (Entered: 02/21/2013)
		* * *
01/30/2015	82	OPINION of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment, Check for Receipt of Mandate on 3/2/2015. (jgw) (Entered: 01/31/2015)
01/30/2015	83	JUDGMENT of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment (jgw) (Entered: 02/02/2015)
04/08/2015	84	MANDATE of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment. (jlg) (Entered: 04/09/2015)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 12-1213, 12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE;
WILLIAM E. ARMSTRONG III,

Defendants, Appellants.

Appeals from the United States District Court
for the District Of Maine

[HON. JOHN A. WOODCOCK, *U.S. District Judge*]

January 30, 2015

Before

LYNCH, *Chief Judge*,
TORRUELLA and STAHL, *Circuit Judges*.

VIRGINIA G. VILLA, Assistant Federal Defender, Federal Defender Office, for appellants.
RENÉE M. BUNKER, Assistant United States Attorney, with whom THOMAS E. DELAHANTY II, United States Attorney, was on brief, for appellee.

LYNCH, *Chief Judge*. The Supreme Court has directed us, in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014), to consider again our decision in these two cases that both defendants had indeed been convicted under state law of "misdemeanor crimes of domestic violence," as defined in 18 U.S.C. § 921(a)(33)(A), even though the state statutes allowed conviction based on a recklessness *mens rea*. *Armstrong v. United States*, 134 S. Ct. 1759 (2014) (Mem.); *see United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Voisine*, 495 F. App'x 101 (1st Cir. 2013) (per curiam). If so, then their motions to dismiss their federal charges for possessing firearms after such convictions, in violation of 18 U.S.C. § 922(g)(9), were properly denied.

Our answer is informed by congressional recognition in § 922(g)(9) of the special risks posed by firearm possession by domestic abusers. "Domestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide . . . ." *Castleman*, 134 S. Ct. at 1408. It is also informed by the congressional choice in the federal sentencing scheme to honor each state's choice as to how to define its own crimes, through statutory text and judicial decision.

As we see it, this case turns on the unique nature of § 922(g)(9). That section is meant to ensure that individuals who engage in the "seemingly minor act[s]" that actually constitute domestic violence, like squeezing and shoving, may not possess a firearm. *Castleman*, 134 S. Ct. at 1412. This range of predicate acts is broader than that found in other federal prohibitions involving the use of physical force. Applying the teachings of *Castleman*, we find that

Maine's definition of reckless assault fits within § 922(g)(9).

We affirm the denial of the motion to dismiss the indictment and information here. That means the conditional guilty pleas the defendants entered are valid and their sentences stand. The question is close and we rule narrowly.

I.

A. *Statutory Background*

As the Supreme Court observed in *Castleman*, 18 U.S.C. § 922(g)(9) was enacted to close a loophole. "While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors." *Castleman*, 134 S. Ct. at 1409. No ban prevented those domestic abusers from possessing firearms, yet there is a "sobering" connection between domestic violence and homicide. *Id.* The "manifest purpose" of § 922(g)(9), the Lautenberg Amendment to the Gun Control Act of 1968, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife." *United States v. Hayes*, 555 U.S. 415, 426-27 (2009).

Under § 922(g)(9), it is against federal law for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition." In turn, a "misdemeanor crime of domestic violence" is defined in § 921(a)(33)(A) as an offense that (1) is a misdemeanor under federal, state, or tribal law, and (2) "has, as an element, the use or attempted use of physical force . . . committed by a current or former spouse, parent, or guardian of the victim" or by a person in a similar domestic relationship with the victim.

The predicate offenses in these cases are convictions under Maine assault statutes. Me. Rev. Stat. Ann. tit. 17-A, §§ 207(1)(A), 207-A(1)(A). Under Maine law, a "person is guilty of assault if [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." *Id.* § 207(1)(A). A violation of § 207 constitutes misdemeanor domestic violence assault if the "victim is a family or household member." *Id.* § 207-A(1)(A).

Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result." *Id.* § 35(3)(A). The statute goes on to give more meat to the "conscious disregard" definition. It refers to disregard of a risk, "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to that person," that "involve[s] a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

B. *Facts*

William E. Armstrong III was convicted in 2002 and 2008 of assaulting his wife in violation of Maine's misdemeanor assault statutes, Me. Rev. Stat. Ann. tit. 17-A §§ 207(1)(A), 207-A(1)(A). In May 2010, twenty-nine months after the last domestic assault conviction, the Maine State Police searched the Armstrong residence for drug paraphernalia and marijuana. They discovered six firearms and ammunition. The police notified the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which executed a search. That search uncovered only ammunition, but Armstrong later explained that he had arranged for a

friend to remove the guns. ATF agents observed the guns at the friend's home.

Armstrong was arrested and federally charged with being a prohibited person in possession of a firearm, in violation of § 922(g)(9). The indictment listed Armstrong's 2008 domestic violence assault conviction as the predicate offense.

Stephen L. Voisine was convicted in 2003 and 2005 of assaulting a woman with whom he was in a domestic relationship, in violation of Maine's assault statute. In 2009, acting on an anonymous tip, state and local law enforcement officials arrested Voisine on the federal misdemeanor charge of killing a bald eagle in violation of 16 U.S.C. § 668(a). When conducting a background check, they discovered his 2003 misdemeanor simple assault. As Voisine had turned a rifle over to the police during the investigation, the criminal information charged him with violating § 922(g)(9) as well as § 668(a).

C. *Procedural History*

Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution. The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision.[1]

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[1] In February 2012, Armstrong was sentenced to three years of probation and a fine and special assessment totaling $2,600. Also in February 2012, Voisine was sentenced to a year and a day imprisonment on the § 922(g)(9) charge with two years supervised release, concurrent with nine months imprisonment and one year supervised release on the § 668(a) charge, and $125 in special assessments.

We consolidated Armstrong and Voisine's cases. In a January 18, 2013 opinion, we affirmed the district court's decisions. *Armstrong*, 706 F.3d at 1; *see Voisine*, 495 F. App'x. at 102 (incorporating the reasoning from Armstrong as there were "no pertinent factual differences" distinguishing the two cases). The defendants had argued that a misdemeanor assault on the basis of offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence." Relying on *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011), and *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), we held that § 922(g)(9) did not distinguish between violent and nonviolent convictions, and the statute included the offensive physical contact portion of the Maine statute within its definition of "physical force." *Armstrong*, 706 F.3d at 6; *Voisine*, 495 F. App'x at 101-02.

Second, the defendants argued that § 922(g)(9) violated the Second Amendment as applied to them. This argument was foreclosed by *Booker*, which denied an identical argument framed as a facial challenge. 644 F.3d at 22-26; *see Armstrong*, 706 F.3d at 7-8; *Voisine*, 495 F. App'x. at 101.

The defendants petitioned for certiorari. On March 31, 2014, the Supreme Court granted their petitions, vacated the judgments, and remanded "for further consideration in light of *United States v. Castleman*." *Armstrong v. United States*, 134 S. Ct. 1759 (2014) (Mem.). In *Castleman*, the Court had addressed the issue of whether the phrase "use of physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching. That issue had been the source of a circuit split. *Castleman* resolved the question in agreement with *Nason*, holding that "Congress

incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *Castleman*, 134 S. Ct. at 1410. The Supreme Court left open whether a conviction with the *mens rea* of recklessness could serve as a § 922(g)(9) predicate. *Id.* at 1414. In footnote 8, the Court stated, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," and listed ten cases.[2] *Id.* at 1414 n.8. It then added, "*But see United States v. Booker*, 644 F.3d 12, 19-20 (C.A.1 2011)." *Id.* The footnote did not say *Booker* was wrong. It gave no further definition of recklessness. Nor did it account for the differences in the statutory sections being interpreted in the other cases cited.

This case comes to us following the Supreme Court's remand.

II.

In construing § 922(g)(9)'s applicability to a given case, we use the "categorical approach." Under that approach the elements of the predicate offense (here, the Maine assault statute) must be identical to or categorically within the description of the subsequent provision (here, § 922(g)(9)). *See Castleman*, 134 S. Ct.

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[2] *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–36 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468–69 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–65 (3d Cir. 2005) (Alito, J.); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

at 1413. Where, as here, the predicate statute is "divisible" into crimes with alternative sets of elements, we may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the "modified categorical approach." *Id.* at 1414. The government concedes that the record here of the state proceedings is too sparse to "discern under which prong of Maine's statute" the defendants were convicted, and they urge us against "resort[ing] to the modified categorical approach." For us to affirm, we must find that the Maine statute—including the reckless acts it prohibits—categorically fits within § 922(g)(9).

The defendants frame the issue as whether a reckless act can constitute a "use of physical force" and rely on cases interpreting statutes other than § 922(g)(9). We do not agree that is the proper way to frame the question. That framing is predicated on the notion that particular statutory language must be interpreted identically in different sections across the U.S. Code. To the contrary, context matters, as the Supreme Court demonstrated in *Castleman* itself. 134 S. Ct. at 1410-12. The question is whether Maine's definition of recklessness fits within § 921(a)(33)(A)'s phrase "use of physical force." Section 921(a)(33)(A) is a provision crafted in the unique context of domestic violence, and it should be so interpreted. *Castleman*, 134 S. Ct. at 1410-12 & n.4; *Booker*, 644 F.3d at 18-21.

This reframing of the question clarifies our approach to the two arguments raised by the defendants: that *Castleman* footnote 8 decides this case, and that *Castleman's* analysis of § 921(a)(33)(A) undermines our prior decisions. *Castleman's* emphasis

on context reinforces, rather than undermines, our earlier decision.

A. Castleman *Footnote 8*

The defendants read too much into *Castleman* footnote 8, which expressly does not resolve the question before us. Nor is their argument made by reference to the cases cited for contrast in the footnote. Each of those cases[3] construes a different statutory definition, and all but one arose in a different context.

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[3] All but one of the ten cases cited in *Castleman* footnote 8 as deciding the § 922(g)(9) *mens rea* issue in fact considered other statutes in other contexts and followed the reasoning of *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). Six cases analyzed 18 U.S.C. § 16. In *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005) (Alito, J.), the Third Circuit read *Leocal* to apply to § 16(b), which offered an alternative definition of "crime of violence" to § 16(a), and decided that reckless crimes cannot be crimes of violence under that section. Three other cases from the footnote did the same. *See Garcia v. Gonzales*, 455 F.3d 465, 467-69 (4th Cir. 2006) (interpreting § 16(b), as referenced in an immigration statute); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 559-62 (7th Cir. 2008) (same); *United States v. Torres-Villalobos*, 487 F.3d 607, 614-17 (8th Cir. 2007) (same). Two more interpreted the same provision, but without relying on *Leocal*, which had yet to be decided. *See Jobson v. Ashcroft*, 326 F.3d 367, 373-74 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001). All of these cases interpreted the term "crime of violence" as part of an aggravated felony statute, and *Castleman* is clear that the interpretive rules governing felonies do not apply to misdemeanor crimes of domestic violence. 134 S. Ct. at 1411.

Three of the remaining four cases interpreted the term "use of physical force" in the context of a Sentencing Guidelines provision imposing an enhancement for defendants who were deported after committing a felony "crime of violence," U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A). Each of those cases analyzed the provision by analogizing to § 16 and applying *Leocal*. For example, in *United States v. Palomino Garcia*, the Eleventh Circuit explained that both § 16 and the Guidelines provision

Footnote 8 begins by describing the issue as an open question, with a citation to *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). In *Leocal*, the Supreme Court interpreted 18 U.S.C. § 16(a), the definition of the term "crime of violence." 543 U.S. at 8-10. Such a crime requires "use of physical force," and *Leocal* held that the term "use" suggests a *mens rea* higher than negligence, but it withheld judgment on whether recklessness is sufficient, *Castleman*, 134 S. Ct. at 1414 n.8; *Booker*, 644 F.3d at 19-20.

Considering context, section 16(a) is not analogous to the section which concerns us, § 922(g)(9). *Castleman* itself distinguished the term "use of force" in § 16(a), a provision for undifferentiated violent crimes, from the term "use of physical force" in § 922(g)(9)'s domestic violence provision. "Domestic violence" is a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter," including "acts that might not constitute 'violence' in a nondomestic context." *Castleman*, 134 S. Ct. at 1411 & n.4. A "crime of violence," by contrast,

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define the phrase "crime of violence," and they are "almost identically worded." 606 F.3d 1317, 1335 (11th Cir. 2010). It then cited *Leocal* and the other § 16 cases mentioned above to conclude that a "use of physical force" cannot be reckless. *Id.* at 1335-36; *see also United States v. Portela*, 469 F.3d 496, 498-99 (6th Cir. 2006); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008).

Even if § 16 were analogous to § 922(g)(9), that would not resolve the matter. The Third Circuit has explained that some reckless convictions can serve as predicates for § 16 offenses, depending on the nature of the recklessness. *Aguilar v. Att'y Gen.*, 663 F.3d 692, 698-700 (3d Cir. 2011); *cf. United States v. Espinoza*, 733 F.3d 568, 572-74 (5th Cir. 2013) (allowing a reckless conviction to be a predicate for a violent felony under the Armed Career Criminal Act).

"suggests a category of violent, active crimes." *Id.* at 1411 n.4 (quoting *Leocal*, 559 U.S. at 140) (internal quotation mark omitted). As the Supreme Court explained, a "'squeeze of the arm [that] causes a bruise'" is "hard to describe as . . . 'violence'" within the meaning of § 16, but "easy to describe as 'domestic violence'" within the meaning of § 922(g)(9). *Id.* at 1412 (alterations in original) (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)) (internal quotation marks omitted).

Unsurprisingly, the drafting history of § 922(g)(9) indicates that "Congress expressly rejected" the § 16(a) definition, instead developing the term "misdemeanor crime of violence" that was "'probably broader' than the definition" in § 16. *Booker*, 644 F.3d at 19 (citing a statement by Sen. Lautenberg). And where Congress wanted to define a domestic violence crime as a § 16 crime of violence occurring in the domestic context, it has done so—even in the same legislation that contained the Lautenberg Amendment. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E). "That it did not do so here suggests, if anything, that it did not mean to." *Castleman*, 134 S. Ct. at 1412 n.6.

The only case cited in *Castleman* footnote 8 from the domestic violence context is one in which Congress elected to define the crime with reference to § 16. In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit considered whether a reckless misdemeanor could serve as a predicate "crime of domestic violence." 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc) (citing 8 U.S.C. § 1227(a)(2)(E)(i)). Unlike § 922(g)(9), however, the relevant statute in *Fernandez-Ruiz* defined "crime of domestic violence" as a "crime of violence" (referencing § 16) committed against someone in a domestic relationship with the perpetrator. *Id.* at 1124-25. The

Ninth Circuit accordingly conducted a § 16 analysis, applying *Leocal* and cases from other circuits to reach its conclusion. *Id.* at 1127-32. But even that result did not follow so obviously from *Leocal*, as four judges dissented emphasizing the differences between domestic violence and other contexts. *Id.* at 1136 (Wardlaw, J., dissenting).

On remand of this case to us, the defendants' brief adds to the cases in the footnote by citing two other § 922(g)(9) cases, not mentioned in *Castleman*, which they say directly conflict with *Booker*. We disagree. In *United States v. White*, 258 F.3d 374 (5th Cir. 2001), the relevant predicate statute criminalized reckless "conduct that places another in imminent danger of serious bodily injury." *Id.* at 381. The court found that the statute did not require a completed "use of physical force," since it was satisfied by a risk of injury, and the statute extended beyond an "attempted use of force" because attempt liability requires specific intent rather than recklessness. *Id.* at 382-84. Rather than construing the phrase "use of physical force," as *Booker* did, *White* relied on principles of attempt liability to rule out reckless predicate crimes.

In *United States v. Howell*, 531 F.3d 621 (8th Cir. 2008), also added by the defendants, the predicate statute criminalized reckless "conduct which creates a grave risk of death or serious physical injury to another." *Id.* at 624. The court found this provision to be a "catch-all provision applicable to innumerable factual situations," so a completed "use of physical force" is not always or ordinarily present. *Id.*

Simply put, we are aware of no case—including the cases in *Castleman* footnote 8—in conflict with *Booker's* holding that a reckless misdemeanor assault

satisfies § 922(g)(9)'s particular definition of a "misdemeanor crime of domestic violence." Rather, § 922(g)(9)'s unique context, as described in *Castleman* and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly than other provisions, including § 16.

B. *Structure Of* Castleman

The defendants present a second argument, which is that *Castleman*'s analytical approach to the term "use of physical force" means the conduct of neither defendant here could meet that standard. *Castleman* held that Congress intended to incorporate the common law meaning of "force" in § 921(a)(33)(A), the definitional provision for "misdemeanor crime of domestic violence." 134 S. Ct. at 1410. "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common law terms it uses.'" *Id.* (quoting *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013)) (internal quotation mark omitted). As a result, the statutory term "physical force" is satisfied by "the degree of force that supports a common-law battery conviction." *Id.* at 1413. The parties agree that, under *Castleman*, the term "use of physical force" also incorporates the common law *mens rea* for battery.

The parties approach this as a generalized question. They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view. *See, e.g., Johnson v. United States*, 559 U.S. 133, 139 (2010); *Lynch v. Commonwealth*, 109 S.E. 427, 428 (Va. 1921); *Commonwealth v. Hawkins*, 32 N.E. 862, 863 (Mass. 1893); 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(c)(2); 3 William Blackstone, *Commentaries* *120.

We decline the parties' invitation to define the *mens rea* of a common law battery independent of the interpretation Maine gives its own statute. *Castleman* explains that the term "use of physical force" includes "the type of conduct that supports a common-law battery conviction." 134 S. Ct. at 1411. *Castleman* also explains that Congress incorporated "the common-law meaning of 'force.'" *Id.* at 1410. *Castleman* holds that the term "use of physical force" includes both causing bodily injury and offensive contact. Defendants concede that reckless causation of bodily injury is a use of physical force. We see no reasoned argument that offensive physical contact does not similarly entail the use of force simply because it is inflicted recklessly as opposed to intentionally.

We follow the statutory scheme in evaluating whether a conviction under the Maine statute categorically counts as a "misdemeanor crime of domestic violence."

1. *The Scope of a "Misdemeanor Crime of Domestic Violence"*

As *Castleman* explained, § 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms. 134 S. Ct. at 1408-12. "[B]ecause perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" *id.* at 1411 (quoting *Hayes*, 555 U.S. at 427), we think Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes. *See id.* at 1411, 1413. That encompasses assault statutes for those states that allow conviction with a *mens rea* of recklessness where recklessness is defined as including a degree of intentionality. A victim of

domestic violence often encounters the perpetrator again, and a broader reading of § 922(g)(9)'s *mens rea* requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault. If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9). *Booker*, 644 F.3d at 18 & n.5.

This view is confirmed by the legislative history of § 922(g)(9). Senator Lautenberg explained that § 922 (g)(9) was a broad prohibition covering "any person convicted of domestic violence," without reference to a particular mental state. 142 Cong. Rec. S10377-01 (1996). Another senator made statements to the same effect. *See id.* Additionally, Senator Lautenberg described the law's application to scenarios without clear intent, in which domestic arguments "get out of control," "the anger will get physical," and one partner will commit assault "almost without knowing what he is doing." 142 Cong. Rec. S11872-01 (Sept. 30, 1996). Such conduct may not be "knowing," but it nonetheless constitutes a "use" of physical force—whether it causes offensive contact or bodily harm.

2. *Maine's Definition of "Recklessness"*

Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a *mens rea* involving a substantial amount of deliberateness and intent. The statutory definition requires that a person "*consciously* disregard[] a risk that the person's conduct will cause" the result. Me. Rev. Stat. Ann. tit. 17-A § 35(3)(A) (emphasis added). The disregard of the risk is "viewed in light of the nature and *purpose* of the person's conduct and the circumstances

known to the person." *Id.* § 35(3)(C) (emphasis added). Further, it must "involve a gross deviation" from the standard of reasonable care. *Id.*

Maine's definition of "recklessly," like its definition of "knowingly," includes an element of intentionality and specificity. To act "knowingly" in Maine, the person must be aware that the result is "practically certain" to occur. *Id.* § 35(2)(a). Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur. *Cf.* 2 LaFave, *Substantive Criminal Law*, § 5.4(f). To act knowingly and recklessly, but not negligently, the person must be aware of the risk: the recklessness definition requires reference to "the nature and purpose of the person's conduct and the circumstances *known* to the person." Maine's Supreme Judicial Court has made clear that the recklessness inquiry focuses on the person's "*subjective* state of mind." *Stein v. Me. Criminal Justice Acad.*, 95 A.3d 612, 618 (Me. 2014) (quoting *State v. Goodall*, 407 A.2d 268, 280 (Me. 1979)) (internal quotation mark omitted); *see State v. Hicks*, 495 A.2d 765, 771 (Me. 1985) (comparing the subjective test for recklessness with the objective test for negligence).

For example, the Maine Supreme Judicial Court has affirmed a conviction for "act[ing] recklessly when [the defendant] shot a powerful handgun into the woods in a residential area and in the direction of his next-door neighbor's home, knowing where it was located." *State v. Kline*, 66 A.3d 581, 584 (Me. 2013) (citing Me. Rev. Stat. Ann. tit. 17-A § 35). It also affirmed a conviction for reckless conduct with the use of a dangerous weapon when the defendant "drove his van alongside the victim's vehicle, remaining there . . .[,] used his van

to push the victim's vehicle into heavy oncoming traffic, and made contact with that vehicle at least once." *State v. York*, 899 A.2d 780, 783 (Me. 2006).

Maine's definition of recklessness includes a volitional component. In this, it is like other states. *See Fernandez-Ruiz*, 466 F.3d at 1141 (Wardlaw, J., dissenting) (collecting cases). Notwithstanding *Leocal*, some judges found that even § 16 encompassed reckless predicate convictions. In *Fernandez-Ruiz*, four dissenting judges of the Ninth Circuit observed that Arizona's definition of recklessness, like Maine's, requires that the person "be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that risk." *Id.* Recklessness includes an "volitional, active decision, which necessarily involves 'a higher degree of intent than negligent or merely accidental conduct.'" *Id.* (quoting *Leocal*, 543 U.S. at 9); *accord Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 449-50 (4th Cir. 2005) (Niemeyer, J., dissenting) ("Unlike a person who accidentally injures another person, a person who acts recklessly in bringing about harm to another is aware of the nature of his conduct and thus can be said to be 'actively employ[ing]' the physical force that results in injury 'against another.'" (alteration in original) (quoting *Leocal*, 543 U.S. at 9)).

3. *Categorical Comparison*

We conclude that reckless assault in Maine is "use of physical force" within the meaning of a "misdemeanor crime of domestic violence." As noted above, § 922(g)(9) is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances. This often constitutes domestic violence. Reckless assaults

in Maine fit that congressional intent for § 922(g)(9), including the paradigm of a domestic assault as described by Senator Lautenberg. As the dissenting judges on the Ninth Circuit, concerned with a different federal statute, explained:

> "Domestic abusers may be drunk or otherwise incapacitated when they commit their crimes, and they may plea bargain down from a felony to a misdemeanor or from a statute that requires a *mens rea* of intentionality to one that can be satisfied by recklessness. But this does not alter the nature of domestic violence as a crime involving the use of force against someone in a domestic relationship . . . ."

Fernandez-Ruiz, 466 F.3d at 1139 (Wardlaw, J., dissenting).

Defendants' position assumes that a reckless act cannot be an act of domestic violence because it lacks volition. But that is not true. For example, suppose Maine convicts a husband for throwing a knife toward his wife, intending to instill fear rather than to cause physical injury, but actually striking her. The *mens rea* of the conviction would likely be recklessness: in light of the circumstances known to the husband, he consciously disregarded the risk of harm. Such a reckless assault can "subject one intimate partner to the other's control," *Castleman*, 134 S. Ct. at 1411, and is the type of conduct included in § 922(g)(9) even though the husband did not intend to cause bodily injury or offensive contact. Similarly, if Maine prosecutes and convicts a parent for assault for waving a lit cigarette near a child in anger, the cigarette touching and burning the child, that conviction in context may well be an act of domestic violence.

The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury. We do not see why that distinction is material to the analysis here. The issue is whether § 922(g)(9) encompasses reckless uses of force, regardless of whether the use of force results in bodily injury or an offensive physical contact. If the husband's knife grazes his wife or harms her grievously, it is an assault all the same.[4]

As a practical matter, it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate. *See James v. United States*, 550 U.S. 192, 208 (2007) (explaining that the categorical approach focuses on "the ordinary case," not "every conceivable factual offense covered by a statute"); *United States v. Fish*, 758 F.3d 1, 6 (1st Cir. 2014) ("[I]n assessing whether the elements of the candidate proposed as a predicate crime are overbroad, we need not consider fanciful, hypothetical scenarios."). Maine will not prosecute all "[m]inor uses of force." *Castleman*, 134 S. Ct. at 1412; *see Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (Evans, J., concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims. [The defendant] actually beat his wife . . . ."). But some

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[4] The dissent wrongly relies on our decision in *United States v. Bayes*, 210 F.3d 64 (1st Cir. 2000), for the proposition the federal assault statute requires deliberate action. *Id.* at 69 (citing 18 U.S.C. § 113(a)(5)). *Bayes* says that "it is sufficient to show the defendant deliberately touched another in a patently offensive manner without justification or excuse." *Id.* In deciding that the statue did not require specific intent, *Bayes* did not pass on whether recklessness would satisfy the statute. Further, the dissent relies on the rule of lenity, an argument not made by the defendants.

grabbing and slapping "accumulat[es] . . . over time," "subject[ing] one intimate partner to the other's control." *Castleman*, 134 S. Ct. at 1412. When it eventually "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence.'" *Id.* After all, not all assaults will serve as § 922(g)(9) predicates, but only those occurring in the domestic context.

To be clear, we do not decide that, on the spectrum from negligence to intentional acts, recklessness is always closer to the latter. *Cf. Fernandez-Ruiz*, 466 F.3d at 1141-42 (Wardlaw, J., dissenting) ("Recklessness is a distinct *mens rea*, which lies closer to intentionality than to negligence."). We also do not decide that recklessness in the abstract is always enough to satisfy § 922(g)(9).[5] We decide only that the Maine definition is sufficiently volitional that it falls within the definition of "use of physical force" applied in § 922(g)(9). *See Booker*, 644 F.3d at 18.

C. *Our Recent Decision in* Carter *Does Not Help the Defendants*

In *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014), we encountered similar facts to this case. We

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[5] As recognized at 2 LaFave, *Substantive Criminal Law*, § 5.4 n.6, "usage of the term [recklessness] has not been consistent." *See, e.g., United States v. Meeks*, 664 F.3d 1067, 1070-71 & n.2 (6th Cir. 2012) (explaining that "recklessness" in Kentucky is a lower standard than "being aware of and consciously disregarding a substantial and unjustifiable risk"). As the dissent observes, while the Model Penal Code definition is similar to Maine's (though not identical), Puerto Rico's definition—until the new statute is in effect—has language quite different from the Maine statute.

remanded for the district court to determine whether the defendant had indeed been convicted of a reckless assault. The opinion noted that *Castleman* "casts doubt" upon *Booker*, but it explicitly did "not decide" the question before this court. *Id.* at 18 & n.11. Now, squarely presented with the issue and having reviewed *Castleman*, we resolve the question left open by *Carter*.

III.

The defendants make three constitutional arguments, none of which are successful.

First, the defendants renew their prior argument that § 922(g)(9) violates the Second Amendment as applied to them. They explicitly raise the argument only to preserve it, and for good reason: it is "foreclosed by binding precedent in this circuit." *Carter*, 752 F.3d at 13; *see Armstrong*, 706 F.3d at 7-8; *Booker*, 644 F.3d at 22-26.

Second, the defendants offer a "gloss" on their earlier argument. They suggest that *Castleman* held that the link between non-violent misdemeanors and domestic violence involving firearms is extremely tenuous, and they argue that such a tenuous link cannot support the law's constitutionality. To the contrary, *Castleman* explained that the link between non-violent misdemeanors and domestic violence involving firearms is "sobering," and hardly tenuous. 134 S. Ct. at 1409.

The defendants also raise an argument outside the scope of the Supreme Court's remand. They claim that § 922(g)(9) violates the Fifth Amendment, Sixth Amendment, and Ex Post Facto Clause because the determination that the predicate crime involves domestic violence is made at the time of the § 922(g)(9)

conviction, rather than at the time of the predicate conviction.

We have discretion to reexamine issues beyond the scope of the Supreme Court's specific remand order when "necessary to avoid extreme injustice." *United States v. Burnette*, 423 F.3d 22, 25 n.6 (1st Cir. 2005) (quoting *United States v. Estevez*, 419 F.3d 77, 82 (1st Cir. 2005)) (internal quotation mark omitted). But "[t]here is no injustice in refusing to reexamine a carefully considered decision based on the same arguments that we have already rejected." *Id.* at 25 n.6. The Supreme Court has already rejected arguments very similar to the defendants' in *United States v. Hayes*, 555 U.S. 415, 421 (2009).

The defendants argue that *Hayes* was implicitly overruled by a recent Supreme Court decision, *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Hayes* held that the determination that an earlier conviction involved a domestic relationship is an element of § 922(g)(9), not the predicate conviction. 555 U.S. at 418. *Descamps* limited the extent to which courts can look at the facts underlying the predicate conviction to determine whether they fit the subsequent conviction, under the modified categorical approach. 133 S. Ct. at 2281-82. The defendants argue that, as in *Descamps*, the subsequent court may not evaluate the predicate conviction to determine a fact about it—here, whether it involved a domestic relationship.

We reject this argument. Whether the predicate conviction involved a domestic relationship is not a fact about the predicate conviction discerned through application of the modified categorical approach, in violation of *Descamps*. It is an element proved anew in the § 922(g)(9) proceeding.

IV.

The question before us is a narrow one. We are asked to decide whether a conviction for reckless assault against a person in a domestic relationship in Maine constitutes a federal "misdemeanor crime of domestic violence." Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts. *Castleman* recognizes as much.

For the reasons stated above, we *affirm* the judgments of guilt.

So ordered.

-Dissenting Opinion Follows-

TORRUELLA, *Circuit Judge*, Dissenting. The majority fails to adequately justify its departure from the Supreme Court's direction and the analogous decisions of our sister circuits. Indeed, the Supreme Court's message is clear. In *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Court noted that we are the only outlying circuit on this question: our prior precedent is inconsistent with every other circuit court to consider the issue. *See id.* at 1414 n.8 (contrasting our past position with that of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, which have "uniformly held that recklessness is not sufficient" to "constitute a 'use' of force"). The Court then remanded the instant cases for reconsideration in light of *Castleman*, *see United States v. Armstrong*, 134 S. Ct. 1759 (2014), implicitly suggesting that we bring our holdings in line with the other federal circuit courts of appeals. We are obligated to heed the Supreme Court's direction. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."). Not only are the Supreme Court's instructions mandatory, but the legal reasoning and analysis in the cases cited by the Court are also correct.

On remand, this case requires us to answer, at the very least, one question of statutory interpretation: whether a Maine conviction for the "reckless" causation of an "offensive physical contact" necessarily involves the "use or attempted use of physical force" as required to establish a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9).

The majority fails to persuasively explain why, *in all cases*, the merely reckless causation of offensive physical contact categorically *must* involve the "use or attempted use of physical force," 18 U.S.C. § 921 (a)(33)(A), particularly in light of the host of cases strongly suggesting otherwise. As explained herein, these cases hold that the "use" of physical force requires the active or intentional employment of force, which cannot be satisfied by merely reckless conduct.

Confronting this question, we are not acting upon an empty stage; rather, we must start with the backdrop painted by the Supreme Court in *Castleman*, which is the basis for the instant remand. Indeed, the *Castleman* Court questioned whether the "merely reckless causation" of even bodily injury—much less offensive physical contact—could constitute the "use" of force, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," because the "use" of force requires a greater degree of intentionality. *Castleman*, 134 S. Ct. at 1414 & n.8.

Although the majority opinion correctly observes that those circuit court cases involved different statutes, the operative language is nearly identical and the majority fails to persuasively explain why the result should be different here. All of the analogous cases involved the "use" of "force," and most interpreted 18 U.S.C. § 16. *See id.* at 1414 n.8 (listing cases). Several of these cases[6] analyzed § 16(a), which

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[6] *See United States v. Torres-Villalobos*, 487 F.3d 607, 616-17 (8th Cir. 2007) (holding that Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force, and therefore is not a crime of violence under § 16(a)); *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006) (holding that reckless conduct cannot constitute the "use" of force

defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). That language is materially indistinguishable, as relevant here, from the Lautenberg Amendment's definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 922(g)(9); *id.* § 921 (a)(33)(A). "[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005).[7]

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for purposes of § 16(a)); *García v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (reasoning that the "use" of "physical force" requires the *intentional* employment of physical force, and therefore holding that a New York second-degree reckless assault conviction is "beyond the scope" of § 16(a)).

[7] Moreover, the cases involving § 16(b) provide even stronger support for the defendants' position here, as § 16(b) involves language more susceptible than that of § 16(a) or the Lautenberg Amendment to a reading that encompasses reckless conduct. *Compare* 18 U.S.C. § 16(b) (defining a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Yet most courts nonetheless have rejected arguments that § 16(b) can be satisfied by a predicate offense with a *mens rea* of recklessness. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) ("[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only *intentional* conduct and refers only to those offenses in which

The majority opinion concedes that this case presents a "close" question. *Ante*, at 3. I agree. Given the Supreme Court and circuit court cases interpreting similar statutes and holding that merely reckless conduct is insufficient to constitute the "use" of physical force, I believe that the rule of lenity also forecloses the defendants' convictions here. Indeed, it is a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" towards the accused. *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)).[8] The rule of lenity bars courts from giving the text of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage v. United States*, 134 S. Ct. 881, 891 (2014). In my view, by permitting a conviction based on the reckless causation of offensive physical contact, the government and the majority seek to give the "use . . . of physical force" a meaning different from that phrase's ordinary meaning. The ordinary meaning of the "use" of physical force requires the *intentional*

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there is a substantial likelihood that the perpetrator will *intentionally* employ physical force.'" (internal quotation marks omitted) (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001))).

[8] In addition to its acknowledgment that this is a "close" case, the majority's reliance on legislative history also suggests that the statutory text is ambiguous. *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."). Furthermore, the contrasting results reached by the First Circuit and our sister circuits on the interpretation of the phrase "use . . . of physical force" provide additional evidence of that statutory text's ambiguity.

employment of force, and not the merely accidental, negligent, or reckless use of such force. *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 4 (2004) (giving an ordinary and natural reading to the phrase "'use . . . of physical force against the person or property of another,'" and holding that this phrase requires "a higher degree of intent than negligent or merely accidental conduct" (quoting 18 U.S.C. § 16(a))); *id.* (explaining that "'use' requires active employment," and reasoning that "a person would 'use . . . physical force against' another when pushing him . . . [but not] by stumbling and falling into him"); *García v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (holding that "the use . . . of physical force" requires the *intentional* employment of physical force). Moreover, given that the Supreme Court has stated that (1) "the merely reckless causation of bodily injury . . . may not be a 'use' of force," and (2) "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute the "use" of force, *Castleman*, 134 S. Ct. at 1414 & n.8, I cannot see how the proper application of the rule of lenity permits affirmance of the defendants' convictions.

I express no opinion here on whether the "use" of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact. Rather, I confine my inquiry to one subsumed offense under the Maine assault statutes: the reckless causation of offensive physical contact. Although the majority states that they fail to see why the distinction between "bodily injury" and "offensive physical contact" "is material to the analysis here," *ante*, at 22, I explain herein why that distinction matters. *See infra* Section II(B)(1). Namely, even if recklessness were a sufficient *mens rea* for purposes of bodily injury, a conviction

under the Lautenberg Amendment nonetheless cannot rest on the reckless causation of offensive physical conduct in Maine.[9]

The Supreme Court has stated that, under the Lautenberg Amendment, Congress classified as a "'misdemeanor crime of domestic violence'" "the type of conduct that supports a common-law battery conviction." *Castleman*, 134 S. Ct. at 1411. The Supreme Court has further explained that "the common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another." *Johnson v. United States*, 559 U.S. 133, 139 (2010) (emphasis added); *see also United States v. Bayes*, 210 F.3d 64, 69 (1st Cir. 2000) ("[T]he common law provided that an assault committed by way of a battery did not require an intent to cause or

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[9] All of the examples cited by the majority—squeezing, shoving, a squeeze of the arm that causes a bruise, shooting a powerful handgun in the direction of a neighbor's home, driving a van to make contact with another vehicle and to push the victim's vehicle into heavy oncoming traffic, a husband throwing a knife towards his wife intending to instill fear but actually striking her, and waving a lit cigarette near a child in anger so that the cigarette touches and burns the child, *ante*, at 3, 12, 19-20, 21-22—involve *intentional* conduct that is reckless as to the result, which in nearly all of those examples is bodily injury. By contrast, the Maine statutes at issue here permits conviction for far less culpable conduct: merely *reckless* conduct that is also reckless as to the result of offensive physical contact. In so doing, the majority conflates *mens rea* as to the result with *mens rea* as to the underlying conduct that causes the result. It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does *not* permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching.

to threaten an injury as long as the defendant touched another in a *deliberately offensive* manner without a valid reason to do so.") (emphasis added); *State v. Rembert*, 658 A.2d 656, 658 (Me. 1995) (stating that "[u]npermitted and *intentional* contacts [are] actionable as an offensive contact") (emphasis added); *cf.* Wayne R. LaFave, 2 *Substantive Criminal Law* § 16.2(c)(2) n.32 (2d ed.) ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); *Black's Law Dictionary* 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, *intentional*, and offensive touching of another without lawful justification") (emphasis added). To trigger a violation of the Lautenberg Amendment, therefore, the relevant precedent counsels that the offensive touch must be caused intentionally and not merely recklessly. By contrast, the Maine statutes at issue here permit conviction for recklessly causing an offensive touch.[10] Therefore, a conviction under either of the Maine assault statutes implicated here does not categorically establish a violation of the Lautenberg Amendment. Given that the record does not permit a conclusion that the defendants' Maine convictions rested on a subsumed offense that *does* constitute a violation of

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[10] To recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact—something more than a mere touching—that a reasonable person would find to be offensive under the circumstances. *See* Me. Rev. Stat. tit. 17-A, § 35(3) (defining recklessness); *id.* § 207(1)(A) (simple assault); *id.* § 207-A(1)(A) (domestic violence assault). Therefore, to sustain a Maine conviction for this subsumed offense, the defendant need not intend that physical contact occur nor intend that the contact be considered offensive.

the Lautenberg Amendment, the federal convictions at issue here cannot stand.[11]

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[11] Despite the foregoing, the majority opinion offhandedly rejects the relevance of the *mens rea* for battery under the common law. *See ante*, at 16 ("The parties agree that, under *Castleman*, the term 'use of physical force' also incorporates the common law *mens rea* for battery . . . . They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view. We decline the parties' invitation to define the *mens rea* of a common law battery . . . .") (citations omitted). At the same time, the majority cites *Castleman* for the proposition that the "use" of physical force includes offensive contact, due to the common-law meaning of "force" for purposes of battery. *Id.* The majority opinion thus relies on the *actus reus* for battery under the common law, but simultaneously rejects the relevance of the accompanying *mens rea* for common-law battery. *See id.* In so doing, the majority fails to sufficiently justify its decision to "decline" the parties' "invitation" to consider the import of the *mens rea* of common-law battery to the question at bar. Such a decision requires justification, particularly because the Supreme Court in *Castleman* also extended an "invitation" for us to consider this issue when it explained that Congress intended to classify as a "'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *See Castleman*, 134 S. Ct. at 1411.

Nothing in *Castleman* suggests that the phrase "type of conduct" refers only to the *actus reus* for battery and not also the accompanying *mens rea*. Indeed, the contrary conclusion makes far more sense. If Congress meant to incorporate the common-law crime of battery, it most likely meant to incorporate both the *actus reus* and its accompanying *mens rea*. *See, e.g., United States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013) ("'In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.'" (quoting *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980))); *United States v. Cornelio-Pena*, 435 F.3d 1279, 1286 (10th Cir. 2006) (stating that "most crimes . require[] both *mens rea* and *actus reus*"); *cf. United States v. Freed*, 401 U.S. 601, 607-08 (1971) (explaining that when "Congress borrows terms of art" from the common law,

After giving careful consideration to the issues involved, engaging in the necessary statutory interpretation and legal analysis, and applying the relevant precedent, I heed the Supreme Court's direction and follow the lead of our sister circuits in disagreeing with the majority's conclusion. Therefore, I respectfully dissent.

I. LEGAL BACKGROUND

A. The Statutory Framework

1. The Lautenberg Amendment

The defendants here were charged with violating the Lautenberg Amendment to the Gun Control Act of 1968, now codified at 18 U.S.C. § 922(g)(9) (the "Lautenberg Amendment" or "§ 922(g)(9)"). Under the Lautenberg Amendment, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(9). For these purposes, a "misdemeanor crime of domestic violence" is further defined in 18 U.S.C. § 921(a)(33)(A) as an offense that:

> (I) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, *as an element*, the *use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the

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"it presumably knows and adopts the cluster of ideas that were attached to each borrowed word" (internal quotation marks and citation omitted)).

> victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

Id. § 921(a)(33)(A) (emphases added).

2. The Relevant Maine Assault Statutes

The defendants argue that the relevant Maine assault statutes do not "ha[ve], as an element, the use or attempted use of physical force." *See id.* Under Maine law, a defendant is guilty of "domestic violence assault" if (1) the defendant violates the Maine simple assault provision, and (2) "the victim is a family or household member." *See* Me. Rev. Stat. tit. 17-A, § 207-A(1)(A).

Turning to the simple assault provision in the Maine Criminal Code, a person is guilty of "assault" if "[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." *See* § 207(1)(A). Thus, there are six different, divisible permutations of the Maine simple assault statute, each of which can form the basis for a section 207 assault conviction. *United States v. Carter*, 752 F.3d 8, 17-18 (1st Cir. 2014) ("The Maine general-purpose assault statute is divisible into six permutations of subsumed offenses, based on the combination of one element from each of two categories: (1) *mens rea* ('intentionally, knowingly or recklessly'), and (2) actus reus ('causes bodily injury or offensive physical contact to another person')." (quoting § 207(1)(A))). These six subsumed offenses are illustrated in the following chart:

The six variants of the Maine simple assault statute:

Maine simple assault statute, Me. Rev. Stat. tit. 17-A, § 207(1)(A)		Actus Reus	
		. . . causes bodily injury.	. . . causes offensive physical contact.
Mens rea	Intentionally . . .	1. Intentionally causes bodily injury.	4. Intentionally causes offensive physical contact
	Knowingly .	2. Knowingly causes bodily injury.	5. Knowingly causes offensive physical contact.
	Recklessly . .	3. Recklessly causes bodily injury.	6. Recklessly causes offensive physical contact.

In Maine state court, Armstrong was convicted of Maine domestic-violence assault under section 207-A, and Voisine was convicted of Maine simple assault under section 207.[12] These prior convictions served as the predicate offenses for the defendants' § 922(g)(9) charges, which are the subject of the instant appeal. A simple assault statute lacking a domestic-relationship element (such as Voisine's prior offense of conviction in Maine) can nonetheless serve as the predicate

[12] Violation of either provision—the general assault offense or "domestic violence assault"—constitutes a "Class D" crime under the Maine Criminal Code, which is equivalent to a misdemeanor. *See State v. Allen*, 377 A.2d 472, 475 n.4 (Me. 1977) ("We therefore deem Class D and Class E crimes to be the Criminal Code equivalents of misdemeanors.").

offense for a misdemeanor crime of domestic violence, so long as the domestic-relationship element is proved in the subsequent federal prosecution. *See United States v. Hayes*, 555 U.S. 415, 418 (2009) (holding "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense").

B. The Categorical and Modified Categorical Approaches

Given the foregoing statutory framework, we must analyze whether the elements of the Maine assault statute necessarily fulfill the requirements of the Lautenberg Amendment. In cases such as this—where a court must decide whether a prior conviction for an earlier offense (like assault) satisfies one of the elements of the offense in a subsequent prosecution (here, for example, whether the earlier offense "has, as an element, the use . . . of physical force," 18 U.S.C. § 921(a)(33)(A))—the court determines whether it is appropriate to apply the categorical approach or the modified categorical approach.

1. The Categorical Approach

In *Taylor v. United States*, 495 U.S. 575, 600 (1990), the Supreme Court described the categorical approach, under which courts "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *See also United States v. Dávila-Félix*, 667 F.3d 47, 56 (1st Cir. 2011) (same). If the "statutory definition" of the prior offense *necessarily* meets the requirements of the subsequent offense at issue, then the court can determine that a conviction for the prior offense *categorically* constitutes a valid predicate offense for

purposes of the later prosecution. *See Castleman*, 134 S. Ct. at 1414.

2. The Modified Categorical Approach

Some statutes, like the Maine assault statutes at issue here, are "divisible": they "set[] out one or more elements of the offense in the alternative." *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). For these statutes, some permutations or variants of the subsumed offenses may categorically meet the requirements of the subsequent offense, whereas others may not. Accordingly, for these divisible statutes, courts may apply the "modified categorical approach" to determine which variant or subsumed offense formed the basis for the prior conviction, and thus whether that prior conviction can serve as a valid predicate offense for the subsequent prosecution. *See Castleman*, 134 S. Ct. at 1414. Under this approach, a court may "consult[ ] the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms"—in order to "determine which statutory phrase was the basis for the conviction" under such a divisible statute. *Johnson*, 559 U.S. at 144. These documents are often called "*Shepard* documents," after *Shepard v. United States*, 544 U.S. 13 (2005) (plurality opinion). *See, e.g., Carter*, 752 F.3d at 19-20 & 19 n.12.

3. Application

Under established precedent not called into doubt by *Castleman* and not challenged here, certain subsumed offenses under the Maine assault statutes (such as the intentional or knowing causation of bodily injury) are unequivocally valid predicate offenses for

the Lautenberg Amendment. *See Castleman*, 134 S. Ct. at 1415 ("It is impossible to cause bodily injury without applying force in the common-law sense," and "the knowing or intentional application of force is a 'use' of force."). If the *Shepard* documents showed that the defendants' prior assault convictions were for those particular subsumed offenses, for example, then we would be able to apply the modified categorical approach and affirm the defendants' Lautenberg Amendment convictions without reaching the recklessness issue. *See Carter*, 752 F.3d at 18 n.11 (reasoning that under the modified categorical approach, if the *Shepard* documents showed that the defendant's prior Maine conviction was for intentional or knowing conduct, then the court could affirm his conviction under the Lautenberg Amendment). The parties agree, however, that the *Shepard* documents for Armstrong's and Voisine's underlying Maine convictions are inconclusive and do not reveal which variants of the Maine assault statutes served as the bases for their convictions. Therefore, the modified categorical approach cannot resolve this appeal.

Rather, we must apply the categorical approach to determine whether the statutory definitions of the Maine assault provisions necessarily include the "use or attempted use of physical force." *See* 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9); *see also Castleman*, 134 S. Ct. at 1414. Under the categorical approach, if any one of the six variants of the Maine assault statute does not necessarily constitute the "use . . . of physical force," then the defendants' convictions must be reversed. Put differently, to affirm the defendants' convictions under the categorical approach, *all* of the subsumed offenses under the Maine statute must have the "use or attempted use of physical force" as an element. 18 U.S.C. §§ 921(a)(33)(A); *see also United*

States v. Holloway, 630 F.3d 252, 257 (1st Cir. 2011) (stating that under the categorical approach, "the [prior] conviction may only serve as a predicate offense if *each* of the possible offenses of conviction would qualify" as individually satisfying the offense in the subsequent prosecution (citing *Shepard*, 544 U.S. at 26)). The defendants focus their argument on the sixth and least severe subsumed offense: the "reckless" causation of "offensive physical contact." Therefore, we must apply the governing precedent to decide whether this statutory definition necessarily involves the "use . . . of physical force."

C. The Supreme Court's Decisions in *Leocal* and *Johnson*

The Supreme Court's opinions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Johnson v. United States*, 559 U.S. 133 (2010), provided foundational reasoning for subsequent cases relevant to this appeal. In both of these cases, the Supreme Court engaged in statutory interpretation to determine whether the offenses underlying prior state convictions had, as an element, the "use" of physical force as required for purposes of a subsequent federal proceeding.

1. *Leocal*

In *Leocal*, the Supreme Court examined a similar question to that facing us today, regarding parallel language in the statutory definition of a "crime of violence" under 18 U.S.C. § 16(a). Under that statute, a "crime of violence" includes "an offense that has as an element the *use, attempted use, or threatened use of physical force* against the person or property of another." 18 U.S.C. § 16(a) (emphasis added). The petitioner in *Leocal* had previously been convicted in Florida state court for driving under the influence of

alcohol (DUI) and causing serious bodily injury. *Leocal*, 543 U.S. at 3. The Supreme Court held that the petitioner's DUI conviction was not a crime of violence under 18 U.S.C. § 16. *Id.* at 4. In so holding, the Court explained that "'use' requires active employment," reasoning that "a person would 'use . . . physical force against' another when pushing him . . . [but not] by stumbling and falling into him." *Id.* Giving the operative phrase in 18 U.S.C. § 16(a) its ordinary and natural reading, in context, the *Leocal* Court held that the "'use . . . of physical force against the person or property of another'" requires "a higher degree of intent than negligent or merely accidental conduct." *Id.* (quoting 18 U.S.C. § 16(a)). The Court also interpreted parallel language in 18 U.S.C. § 16(b), giving that language "an identical construction" and "requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11.

Additionally, the Court considered the fact that it was "ultimately . . . determining the meaning of the term 'crime of violence.'" *Id.* It reasoned that "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* Therefore, the Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.* Importantly for the instant case, the *Leocal* Court held only that negligent and accidental conduct did not constitute the "use" of force and thus a crime of violence under 18 U.S.C. § 16; the Court did not reach the question whether reckless conduct would be sufficient. *Id.* at 13 ("This

case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16.").

2. *Johnson*

In *Johnson*, the Supreme Court considered a related question: "whether the Florida felony offense of battery by '[a]ctually and intentionally touch[ing]' another person, Fla. Stat. § 784.03(1)(a), (2) (2003), 'has as an element the use . . . of physical force against the person of another,' 18 U.S.C. § 924(e)(2)(B)(I), and thus constitutes a 'violent felony' under the Armed Career Criminal Act, § 924(e)(1)." *Johnson*, 559 U.S. at 135 (alterations in original). The Court observed that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight.'" *Id.* at 138 (quoting *State v. Hearns*, 961 So. 2d 211, 218 (Fla. 2007)). Even "[t]he most 'nominal contact,' such as a 'ta[p] . . . on the shoulder without consent,'" is sufficient to constitute a violation of the Florida law. *Id.* (second and third alterations in original) (quoting *Hearns*, 961 So. 2d at 219).

In determining the definition of "physical force" under the Armed Career Criminal Act ("ACCA"), the Court sought to give the phrase "its ordinary meaning" while keeping in mind the context of its inquiry: defining the statutory category of violent felonies. *Id.* at 138-40. In that context, the Court thought "it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The *Johnson* Court explicitly limited its holding to the ACCA,

asserting that its decision would not extend to the Lautenberg Amendment. *See id.* at 143-44 ("We have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.' We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it.").

D. Pre-*Castleman* First Circuit Precedent: *Nason*, *Booker*, *Armstrong I*, and *Voisine I*

Prior to the Supreme Court's decision in *Castleman*, the defendants' arguments were squarely foreclosed by First Circuit precedent; it is this precedent that the Supreme Court has instructed us to reconsider.

In *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), which also considered the interplay between the Maine simple assault statute and the Lautenberg Amendment, we held that the *actus reus* of "offensive physical contact" necessarily involved the "use or attempted use of physical force," *id.* at 11-12, 21. Synthesizing the definitions of "physical force" from *Black's Law Dictionary* and other dictionaries, we determined that "physical force may be characterized as power, violence, or pressure directed against another person's body." *Id.* at 16. We thus held that § 922(g)(9) does not require that the predicate offense involve "bodily injury," but rather can be satisfied by "any physical force"—including offensive physical contact—"regardless of whether that force resulted in bodily injury or risk of harm." *Id.* at 16-18. Therefore, *Nason* established that either *actus reus* prong of the Maine assault statute—bodily injury or offensive physical contact—could serve as a valid predicate conviction for purposes of § 922(g)(9). *Id.* at 21 ("[B]oth [*actus reus*] variants of assault regulated under

Maine's general-purpose assault statute necessarily involve the use of physical force.").

Whereas *Nason* focused on the *actus reus* variants of the Maine assault statute for purposes of the Lautenberg Amendment, we later focused on the *mens rea* variants in *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011). In *Booker*, we rejected the argument that only an intentional offense could constitute a misdemeanor crime of domestic violence under § 922(g)(9). *Id.* at 13-14. The appellants in *Booker* sought to rely on the Supreme Court's decisions in *Leocal* and *Johnson*, analogizing to the definition of "crime of violence" under 18 U.S.C. § 16 and the definition of "violent felony" under the ACCA, 18 U.S.C. § 924(e). *Id.* at 18-19. We held that those other statutes were not sufficiently analogous to dictate the result in *Booker*, reasoning that, for example, "[w]hereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence." *Id.* at 21. We thus turned to the "plain, unambiguous language of § 922(g)(9)," finding that "the statutory definition of 'misdemeanor crime of domestic violence' does not prescribe an intentional *mens rea*." *Id.* (quoting 18 U.S.C. § 922(g)(9)). Therefore, we held "that an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9)." *Id.* (quoting 18 U.S.C. § 922(g)(9)).

On the initial appeal in this case, *United States v. Armstrong*, 706 F.3d 1, 5 (1st Cir. 2013) ("*Armstrong I*"), *vacated*, 134 S. Ct. 1759 (2014), we considered Armstrong's arguments that the Lautenberg Amendment's prohibition on gun ownership does not

apply to non-violent offensive physical contact. We found the defendant's argument on this issue to be squarely foreclosed by our prior decisions in *Nason* and *Booker*. *Id.* at 2 (citing *Booker*, 644 F.3d 12; *Nason*, 269 F.3d 10). On that basis, we rejected Armstrong's statutory interpretation arguments and affirmed the decision of the district court. *Id.* at 2-6, 8. That same day, we issued an opinion in *United States v. Voisine*, 495 F. App'x 101 (1st Cir. 2013) (per curiam) ("*Voisine I*"), *vacated sub nom. Armstrong v. United States*, 134 S. Ct. 1759 (2014). In a per curiam opinion, we stated that Voisine had raised "the exact same arguments" as those raised in *Armstrong I*. *Id.* Because there were "no pertinent factual differences distinguishing" *Voisine I* from *Armstrong I*, we incorporated Armstrong I's reasoning into the *Voisine I* per curiam opinion and affirmed the district court's decision. *Id.* at 102. Both defendants appealed our decisions in to the Supreme Court.

E. *Castleman* and its Aftermath

1. The Supreme Court's *Castleman* Opinion

Approximately one year later, while the petitions for writs of certiorari were pending in *Armstrong I* and *Voisine I*, the Supreme Court issued its opinion in *Castleman*, 134 S. Ct. 1405. The defendant in *Castleman* had pleaded guilty to a Tennessee offense for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child. *Id.* at 1408-09. After federal authorities subsequently learned that he was selling firearms on the black market, Castleman was indicted on two counts of violating the Lautenberg Amendment. *Id.* at 1409. He argued that the Tennessee statute did not have the use, or attempted use, of physical force as an element of the offense. *Id.* (citing 18 U.S.C. § 921(a)(33)(A)(ii)). The Sixth Circuit

affirmed the dismissal of Castleman's convictions on the § 922(g)(9) counts, holding that the Tennessee conviction was not a valid predicate offense because Castleman might have been convicted for "'caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent.'" *See id.* at 1409–10 (quoting *United States v. Castleman*, 695 F.3d 582, 590 (6th Cir. 2012)). The Supreme Court reversed, reasoning that Castleman had pleaded guilty to intentionally or knowingly causing bodily injury, which "necessarily involves the use of physical force." *Castleman*, 134 S. Ct. at 1414.

The Court explained that "physical force" for purposes of § 922(g)(9) encompasses "the common-law meaning of 'force'—namely, offensive touching." *Id.* at 1410. The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context"—acts like slapping, shoving, pushing, grabbing, hair-pulling, and spitting. *Id.* at 1411 & n.5.

The *Castleman* Court further explained that there are two main categories of assault or battery laws generally used to prosecute domestic abusers: "those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter." *Id.* at 1413. Interpreting "physical force" to exclude a mere "offensive touching" would have rendered the Lautenberg Amendment "ineffectual in at least 10 States—home to nearly thirty percent of the Nation's population—at the time of its enactment." *Id.* (footnote omitted). Therefore, the Court held that the "physical force" requirement is satisfied "by the degree of force that supports a common-law battery conviction"—including an offensive touching. *Id.*

The Court considered whether it could apply the "categorical approach" articulated in *Taylor*, 495 U.S. 575, to resolve the issue, asking if the elements of the Tennessee statute necessarily met the requirements of § 922(g)(9). *Castleman*, 134 S. Ct. at 1414. If the answer were in the affirmative, then the Court could conclude that "a domestic assault conviction in Tennessee categorically constitutes a 'misdemeanor crime of domestic violence.'" *Id.*

Expressing skepticism regarding such a categorical conclusion, the Court stated that "[i]t does not appear that every type of assault defined by [the Tennessee statute] necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'" *Id.* at 1413–14 (quoting 18 U.S.C. § 921(a)(33)(A)). For example, the Court reasoned that under the Tennessee statute, "[a] threat . . . may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury . . . may not be a 'use' of force." *Id.* at 1414. The Court noted that in *Leocal* it had "reserved the question whether a reckless application of force could constitute a 'use' of force," *id.* at 1414 n.8 (citing *Leocal*, 543 U.S. 1), but emphasized that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," *id.* (contrasting our holding in *Booker*, 644 F.3d 12, with the decisions of ten of our sister courts of appeals: the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). The Court declined to hold that a conviction under the Tennessee statute categorically constitutes a misdemeanor crime of domestic violence for purposes of § 922(g)(9) *See id.* at 1414.

On the heels of its *Castleman* opinion, the Supreme Court vacated our prior decisions in *Voisine I* and

Armstrong I, and it remanded those two cases for reconsideration in light of its decision in *Castleman*. *See Armstrong I*, 134 S. Ct. 1759 ("Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *United States v. Castleman*, [134 S. Ct. 1405] (2014)."). There is little disagreement that this remand order calls for us to consider the impact of *Castleman's* Footnote Eight on our prior precedent, particularly *Booker* and *Nason*. In that footnote, the Supreme Court contrasted our *Booker* holding with the decisions of ten of our sister circuits, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to "constitute a 'use' of force." *Id.* at 1414 n.8.

2. The First Circuit's *Carter* Opinion

In the wake of *Castleman* and the Supreme Court's remand of the instant cases, we issued an opinion in *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014). Among other arguments, the defendant in that case, Wayne Carter, raised similar issues to those examined in *Armstrong I*. *Id.* at 9-10. Carter had been convicted in 1997 of a misdemeanor assault in Maine, after his live-in girlfriend at the time, Annie Eagan, told police officers that Carter spit in her face and shoved her right shoulder. *Id.* at 10. Eagan reported that she was not hurt, that she did not want Carter arrested or charged with an offense, and that she only wanted him removed from the house. *Id.* at 10-11. Nonetheless, the Maine state prosecutor charged Carter under Maine's general-purpose assault statute, to which Carter pleaded guilty and was sentenced to time served: thirty days in jail. *Id.* at 11.

Approximately thirteen years later, in 2010, Carter obtained a loan by pawning a rifle that he had

inherited from his dead father. *Id.* at 10. A records check and further investigation in connection with his pawning activities revealed Carter's prior misdemeanor assault conviction. *Id.* The pawn shop's records showed that Carter had pawned and redeemed three separate rifles multiple times between 2007 and 2010. *Id.* at 11. All of the rifles were inherited from his father. *Id.* at 11 n.2. "The firearms were kept in a locked cabinet at his mother's house, and Carter only physically possessed the rifles in connection with pawning them." *Id.* Based on the foregoing, Carter was charged in a one-count indictment for violating the Lautenberg Amendment's prohibition on gun possession by those convicted of a misdemeanor crime of domestic violence. *Id.* at 11. After entering a conditional guilty plea, reserving his right to appeal, Carter was sentenced by the district court to be imprisoned for twelve months and one day—a downward variance from the bottom of the Sentencing Guidelines range: eighteen months. *Id.* at 9, 12. He then appealed, arguing, among other things, that the commission of simple assault by recklessly causing offensive physical contact does not constitute the "use . . . of physical force" as required to establish a misdemeanor crime of domestic violence under the Lautenberg Amendment. *Id.* at 10.

On appeal, we noted that although this argument was previously foreclosed by our holding in *Booker*, "the Supreme Court's recent decision in *Castleman* casts doubt upon this holding." *Id.* at 18 (citing *Castleman*, 134 S. Ct. at 1414 & n.8). In support of that assertion, we cited the Supreme Court's statements that "'the merely reckless causation of bodily injury under [the Tennessee assault statute] may not be a "use" of force,'" *id.* (alteration in original) (quoting *Castleman*, 134 S. Ct. at 1414), and that "'the Courts

of Appeals have almost uniformly held that recklessness is not sufficient' to 'constitute a "use" of force,'" *id.* (quoting *Castleman*, 134 S. Ct. at 1414 n.8). Although *Castleman* had not directly overruled our prior decision in *Booker*, we noted that these statements from the Supreme Court provided a "'sound reason' for thinking that the *Booker* panel might well 'change its collective mind' in light of *Castleman*." *Id.* at 18 n.11 (quoting *United States v. Rodríguez-Pacheco*, 475 F.3d 434, 442 (1st Cir. 2007)).

Despite the Supreme Court's statements in *Castleman* calling into question our prior precedent on this question, it was unnecessary in *Carter* to answer the recklessness issue, because *Carter* potentially could have been resolved via the modified categorical approach: the underlying *Shepard* documents might have "ultimately show[n] that Carter's conviction was under one of the other two mens-rea prongs of the statute—'intentionally' or 'knowingly.'" *Id.* We thus observed that under *Castleman*, "the validity of Carter's § 922(g)(9) conviction may depend on which mens-rea prong of the Maine general-purpose assault statute served as the basis for his guilty plea and conviction." *Id.* at 18. Examining the record for *Shepard* documents that could determine which variant of the Maine assault statute was the basis for Carter's conviction, we found the record incomplete and undeveloped: it was unclear whether such documents existed. *See id.* at 20-21 ("It is not clear . . . whether there are any other 'approved' *Shepard* documents or comparable judicial records available with respect to Carter's prior assault conviction. . . . [T]he record is insufficiently developed to determine which variant of the Maine general-purpose assault statute served as the basis for Carter's conviction."). Accordingly, we "remand[ed] the case to the district

court to allow the parties to further develop the record on this issue," consistent with the Supreme Court's opinion in *Castleman*. *Id.* at 21. In so doing, we reserved the question presented by the Supreme Court's vacatur of *Armstrong I* and *Voisine I* in light of *Castleman*, allowing us to squarely address that issue in the instant remand.

3. District Courts' Application of *Castleman* and *Carter*

To date, three different district court judges in the First Circuit have applied the reasoning of *Castleman's* Footnote Eight regarding these issues; all three opinions concluded that a recklessly committed Maine assault does not necessarily involve the "use" of physical force and thus is not categorically a misdemeanor crime of domestic violence. *United States v. Sales*, No. 2:13-CR-137-NT, 2014 WL 3405658 (D. Me. July 11, 2014); *United States v. Carter*, No. 2:10–cr–00155–GZS, 2014 WL 3345045 (D. Me. July 8, 2014); *United States v. Hines*, No. 1:12–cr–00204–JAW, 2014 WL 1875164 (D. Me. May 9, 2014). Each of these three cases is examined below, in the order that they were decided.

a. Hines

The first district court case to apply the decisions in *Castleman* and *Carter* to these issues was *Hines*, 2014 WL 1875164. The defendant in *Hines* had pleaded guilty in Maine state court to violating the domestic violence assault statute; the *Shepard* documents revealed no further details regarding the conduct underlying this offense. *Id.* at *2. Before the district court, the defendant argued, among other things, that a *mens rea* of recklessness could not satisfy the "use of

force" requirement under the Lautenberg Amendment. *Id.* at *4. The district court noted that pre-*Castleman* First Circuit precedent had previously foreclosed this argument, and "[t]he question is how *Castleman* affects the resolution of the issues [the defendant] has raised." *Id.* at *7.

Examining *Castleman's* Footnote Eight, the court observed that "[t]his footnote, which cited ten circuit courts as concluding that reckless conduct did not constitute 'use of physical force,' strongly hinted that the First Circuit's *Booker* decision was an outlier." *Id.* at *8. The district court then considered the Supreme Court's vacatur of *Armstrong I* in light of *Castleman*. *Id.* The court explained that "[r]eading Supreme Court tea leaves is chancy, but the First Circuit decision in *Armstrong I* was consistent with *Castleman* except for the Circuit Court's brief recklessness analysis." *Id.* Thus, the court found that "[i]t is a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in *Armstrong I* was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis." *Id.* Accordingly, on the basis of *Castleman*, the vacatur of *Armstrong I*, and *Carter*, the district court concluded that it is "questionable" whether a Maine conviction for domestic assault—"without more"—qualifies as a valid predicate conviction for the Lautenberg Amendment. *Id.* at *9.

b. Carter

Following our remand instructions in *Carter*, the district court permitted the parties to further develop the record with *Shepard* documents to determine which subsumed variant of the Maine assault statute formed the basis of Carter's prior state misdemeanor conviction. *Carter*, 2014 WL 3345045, at *6. The only

additional document available was a transcript of Carter's plea colloquy in Maine state court, in which Carter's attorney stated that "'discovery shows that this was no more than a push on the right shoulder, that it was nothing more serious than that.'" *Id.* at *7. Accordingly, on the basis of all the *Shepard* documents, the district court was "unable to identify the offense of Carter's conviction." *Id.*

The district court cited *Hines*, including the statement that "'[i]t is a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in [*Armstrong I*] was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis.'" *Id.* at *5 (quoting *Hines*, 2014 WL 1875164, at *8). The court further observed that "while the statement in *Castleman* was via dictum in a footnote, 'it is much more than an offhand comment. . . . [C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative.'" *Id.* at *6 (quoting *Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004)) (internal quotation marks omitted). Stating that it "cannot ignore the guidance of the Supreme Court and the First Circuit in *Castleman*, *Armstrong* and *Carter*," the district court concluded that "Carter's conviction may only stand if it was premised on more than accidental, negligent or reckless conduct." *Id.* Faced with the absence of any *Shepard* documents permitting such a finding, the district court granted Carter's motion to dismiss the indictment, holding that his 1997 conviction could not serve as a predicate misdemeanor for the Lautenberg Amendment. *Id.* at *7.

c. Sales

Sales, 2014 WL 3405658, is the third and, to date, final district court case to apply *Castleman* and *Carter*. The defendant in that case, Kenneth Sales, had pleaded guilty in Vermont state court to one count of "assault-simple-mutual affray" because he "engaged in a fight or scuffle entered into by mutual consent." *Id.* at *1 (citing Vt. Stat. Ann. tit. 13, § 1023). In that plea colloquy, the Vermont Superior Court judge explained that Sales "recklessly caused bodily injury to a person, and that it was in a fight or scuffle entered into by mutual consent." *Id.* The judge further explained that "there was a physical altercation between [Sales] and [his girlfriend] . . . and that in the course of it [he] at least recklessly . . . caused bodily injury to her, being . . . a scratch or a sort of cut that she received." *Id.* Explaining the *actus reus* of bodily injury, the judge stated that "[b]odily injury is any sort of injury, it doesn't have to be a broken bone or anything like that, it can be a bruise, a cut, kind of anything that hurts." *Id.* With respect to the *mens rea*, the judge explained that "[r]ecklessly means you did not have to intend a particular result, but you engaged in conduct that was not what a reasonable person would do in these circumstances, and had a very high risk that the result would happen." *Id.* Subsequent to this assault conviction in Vermont state court, Sales was charged with a violation of the Lautenberg Amendment in federal district court in Maine. *Id.* at *2.

The district court reviewed the governing precedent, including *Castleman*, *Carter*, and the previous two district court decisions described above, *Hines* and *Carter*. *Id.* at *2-3. Observing that the *Castleman* court emphasized *Leocal's* holding that "use" requires active employment, the district court further

highlighted that "[t]he Supreme Court also pointed out that *Booker* is out of step with other circuit courts that have held that recklessness is not sufficient to constitute a 'use' of force." *Id.* at *3 (citing *Castleman*, 134 S. Ct. at 1414 n.8). Accordingly, the district court opined that "the Supreme Court's remand of Armstrong 'in light of *Castleman*' is fairly construed as a directive to the First Circuit to reconsider whether an assault committed recklessly is sufficient to meet the federal definition of a misdemeanor crime of domestic violence." *Id.* The district court agreed with Chief Judge Woodcock that "'[r]eading Supreme Court tea leaves is chancy,'" *id.* at *4 (quoting *Hines*, 2014 WL 1875164 at *8), but concluded that "it is hard to miss the message here," *id.* The court observed that the First Circuit may yet "decide that recklessness is sufficient," but that it would be "presumptuous" for the district court "to make that determination." *Id.* Therefore, the district court dismissed the defendant's indictment. *Id.*

II. DISCUSSION

On remand, the relevant inquiry is whether the "reckless" causation of "offensive physical contact" under Maine law necessarily constitutes the "use or attempted use of physical force" for purposes of the Lautenberg Amendment. *Compare* Me. Rev. Stat. tit. 17-A, § 207, *with* 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). As a matter of statutory interpretation, we need to compare the text of each side of the equation: (a) the definition of the "reckless" causation of "offensive physical conduct" under the Maine assault statutes; and (b) the definition of the "use . . . of physical force" under the federal Lautenberg Amendment. The former inquiry is a question of Maine state law, while the latter is a question of federal law. Applying the

relevant precedent, this discussion concludes that the reckless causation of offensive physical contact in Maine does not necessarily constitute the "use" of physical force and thus is not categorically a "misdemeanor crime of domestic violence" under the Lautenberg Amendment.

A. The Meaning of the "Reckless" Causation of "Offensive Physical Contact" Under Maine Law

1. The Meaning of "Reckless"

Under the applicable definition in the Maine Criminal Code, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result." Me. Rev. Stat. tit. 17-A, § 35(3)(A). Additionally, "the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

The majority opinion describes this definition of "recklessness" as involving "a substantial amount of deliberateness and intent." *Ante*, at 18. To support this assertion, the majority follows the government's brief in emphasizing that the definition requires that a person "consciously" disregard the risk involved, and that this disregard involves a "gross deviation" from the standard of reasonable and prudent conduct. *Id.* at 18-19. Relying on this language, the government argues that "recklessness lies rather close to 'knowingly'" on the "volitional scale," and that recklessness "is arguably part and parcel of 'willfully.'" Continuing, the government asserts that "[r]ecklessly is more akin to deliberately or knowingly." I disagree.

Contrary to the claim that the Maine definition of recklessness involves "a substantial amount of deliberateness and intent," the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities. Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code. *Cf.* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."). This Model Penal Code definition contains all of the elements and precise language highlighted by the majority as supposedly establishing "a substantial amount of deliberateness and intent." *Cf. ante*, at 18-19 ("*consciously*" disregards, "nature and *purpose* of the person's conduct and the circumstances *known* to [him]," and "gross deviation" from the standard of care) (emphases supplied by the majority).

As revealed in the chart below, the Maine definition of recklessness is also consistent with the equivalent definitions in the Model Penal Code, *Black's Law Dictionary*, and the majority of First Circuit jurisdictions.

Source, Authority, or Jurisdiction	Definition
Model Penal Code § 2.02(2)(c) (emphases added)	"Recklessly. A person acts recklessly with respect to a material element of an offense when he *consciously disregards* a *substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation."
Black's Law Dictionary 1462 (10th ed. 2014) (emphases added)	"reckless, adj. . . . Characterized by the creation of a *substantial and unjustifiable risk of harm* to others and by a *conscious (and sometimes deliberate) disregard* for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a *gross deviation* from what a reasonable person would do. *See* recklessness. . . . Cf. careless; wanton . . . ."
Black's Law Dictionary 1462 (10th ed. 2014) (emphasis added)	"recklessness, n. . . . 1. Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and *consciously takes the risk*. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. 2. The state of mind in which a person does

	not care about the consequences of his or her actions.—Also termed heedlessness. Cf. wantonness."
Maine	"A person acts recklessly with respect to a result of the person's conduct when the person *consciously disregards* a risk that the person's conduct will cause such a result. . . . [T]he disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a *gross deviation* from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev. Stat. tit. 17-A, § 35(3)(emphases added) (subsections defining "recklessly" under the Maine Criminal Code section setting out "Definitions of culpable states of mind"); *see also Stein v. Me. Criminal Justice Acad.*, 95 A.3d 612, 618 (Me. 2014) (applying the foregoing statutory definitions of "recklessly" to the Maine general-purpose assault statute, § 207(1)(A)).
Massachusetts	"Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another." *Sandler v. Commonwealth*, 419 Mass. 334, 644 N.E.2d 641, 643 (Mass. 1995). "[R]eckless conduct involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree but also a

	difference in kind." *Id.*, 644 N.E.2d at 644. "To prove reckless battery, the Commonwealth must establish '(1) that the defendant's conduct involve[d] a high degree of likelihood that substantial harm will result to another, or that it constitute[d] . . . disregard of probable harmful consequences to another and (2) that, as a result of that conduct, the victim suffered some physical injury.'" *United States v. Holloway*, 630 F.3d 252, 261 (1st Cir. 2011) (quoting *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 450 N.E.2d 1100, 1102–03 (Mass. App. Ct. 1983)). "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902, 910 (Mass. 1944) (internal quotation marks omitted).
New Hampshire	"'Recklessly.' A person acts recklessly with respect to a material element of an offense when he is aware of and *consciously disregards* a *substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the *circumstances known*

	to him, its disregard constitutes a *gross deviation* from the conduct that a law-abiding person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts recklessly with respect thereto." N.H. Rev. Stat. § 626:2 (II)(c) (emphases added).
Puerto Rico	*Old:* "[W]hen the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act." P.R. Laws Ann. tit. 33, § 5035 (2012) (unofficial translation supplied). *New:* "A person acts recklessly when he is conscious that his conduct generates a substantial and unjustified risk that the legally prohibited result or circumstance will be produced." 2014 P.R. Laws No. 246, art. 12 (enacting S.B. 1210, and modifying art. 22(3) of Law 146-2012) (unofficial translation supplied).[13]

[13] The situation in Puerto Rico merits some further explanation. Historically, under Puerto Rico's Penal Code, there were two culpable mental states: "intent" and "negligence." *See* P.R. Laws Ann. tit. 33, §§ 4650-4652 (2004). The definition of "intent" included three variants, generally corresponding to the concepts of "purposeful," "knowing," and "reckless" conduct under the Model Penal Code. *See id.* § 4651; *see also* Dora Nevárez-Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico*, 12.1 Elec. J. Comp. L. 16 (May 2008), *available at* http://www.ejcl.org/121/art121-14.pdf. In the 2012 version of the Puerto Rico Penal Code, the third definition of "intent" covered reckless conduct: "when the actor has foreseen or is conscious that there exists a high probability that his conduct

Rhode Island	"[T]he use of the word 'reckless' or 'recklessly' in penal statutes connotes something more than the negligence necessary to support a civil action for damages, and that the two words impart a disregard by the accused for the consequences of his act and an indifference to the safety of life and limb. . . . [T]he distinguishing factor, which properly classifies the operation of a motor vehicle as reckless, is that the evidence shows that a driver has embarked upon a course of conduct which demonstrates a heedless indifference to the consequences of his action." *State v. Lunt*, 106 R.I. 379, 260 A.2d 149, 151 (R.I. 1969).

The definitions of "recklessness" in the preceding chart demonstrate that the Maine definition is a perfectly ordinary, textbook definition of the term. There is nothing about the Maine statute that sets it

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will produce the criminal act." P.R. Laws Ann. tit. 33, § 5035 (2012) (unofficial translation supplied).

In 2014, a new law was proposed, passed by both the Puerto Rico Senate and the House of Representatives, and sent to the Governor for his approval. *See* S.B. 1210 (P.R. 2014). That law was signed and approved on December 26, 2014, and it takes effect on March 26, 2015. *See* 2014 P.R. Laws No. 246. Article 12 of the new law eliminates the old culpable mental states (intent and negligence) and explicitly replaces them with the four mental states in the Model Penal Code: purposely, knowingly, recklessly, and negligently. *Compare id.* art. 12 (modifying art. 22 of Law No. 146-2012), *with* Model Penal Code § 2.02(2); *see also* P.R. House of Representatives, *P. del S. 1210 Informe Positivo* 9 (Nov. 13, 2014), http://www.tucamarapr.org/dnncamara/Documents/Measures /9fda6cce-8 8d9-4e39-a6ae-0dc163f421dc.pdf.

above and beyond the standard definitions provided in the Model Penal Code, *Black's Law Dictionary*, and the other jurisdictions in the First Circuit. Nor does it seem that the Model Penal Code and the First Circuit jurisdictions are unique in their definitions of recklessness. *See, e.g.*, Ariz. Rev. Stat. § 13-105 ("'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and *consciously disregards* a *substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation. . . .") (emphases added); N.Y. Penal Law § 15.05(3) ("A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and *consciously disregards* a *substantial and unjustifiable risk* that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation.") (emphases added). Thus, the Maine definition of "recklessness" is far from extraordinary, but rather embraces the standard, generally accepted definition of the term.

Applying that definition, I disagree with the government's assertion that "[r]ecklessly is more akin to deliberately or knowingly" than negligently. The majority opinion echoes this claim, arguing that "Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur." *Ante*, at 19. The Supreme Court

has held that negligent conduct cannot constitute the "use" of force. *See Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 9. On a volitional spectrum from "negligently" (clearly insufficient to constitute the "use" of force) to "intentionally" (clearly sufficient), the government and the majority seeks to place "recklessly" closer to the latter end. Yet the differences between the definitions of "recklessly" and "criminal negligence" are just as small as (if not smaller than) the differences between "knowingly" and "recklessly." *See Fernández-Ruiz*, 466 F.3d at 1130 ("To the extent recklessness differs from criminal negligence, '[t]he difference between them is that criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk.'" (quoting *In re William G.*, 192 Ariz. 208, 963 P.2d 287, 292 n.1 (Ariz. Ct. App. 1997))); *see also* 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed. 1993). Indeed, just as Maine's definitions of *knowingly and recklessly* "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," *ante*, at 19 (emphasis added), so too do Maine's definitions of *recklessness and negligence* "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," *id.* *Compare* Me. Rev. Stat. tit. 17-A, § 35(3)(A) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result."), *with id.* § 35(4)(A) ("A person acts with criminal negligence with respect to a result of the person's conduct when the person fails to be aware of a risk that the person's conduct will cause such a result."). Therefore, I find the attempt by the government and the majority to establish that

"reckless" conduct in Maine is akin to knowing, willful, or intentional conduct, or involves a "a substantial amount of deliberateness and intent," to be unavailing.

2. The Meaning of "Offensive Physical Contact"

In this context, the *actus reus* of "offensive physical contact" has two constituent elements: first, there must be "physical contact," and second, the physical contact must also be "offensive." Under Maine law, the physical contact required is "not limited to direct touchings, but also c[an] be effected by indirect touchings (*e.g.*, the touching of items intimately connected to the body, such as clothing or a cane, customarily regarded as part and parcel of an individual's 'person')." *Nason*, 269 F.3d at 19 (citing *State v. Rembert*, 658 A.2d 656, 658 (Me. 1995)).

Determining whether the physical contact is "offensive" is an objective test: courts ask whether a reasonable person would find the physical contact to be offensive, under the particular circumstances involved. *See United States v. Pettengill*, 682 F. Supp. 2d 49, 56 (D. Me. 2010) (stating that "'offensive physical contact' means 'physical contact which a reasonable person would find offensive under the circumstances'" (quoting Donald G. Alexander, Maine Jury Instruction Manual § 6–59 (4th ed. 2003)); *see also State v. Pozzuoli*, 693 A.2d 745, 747 (Me. 1997)) ("[T]he question is whether a reasonable person would find the contact to be offensive . . . ."); Restatement (Second) of Torts § 19 ("A bodily contact is offensive if it offends a reasonable sense of personal dignity."). Offensive physical contact, therefore, involves "'something less than bodily injury . . . but requires more than a mere touching of another.'" *Nason*, 269 F.3d at

19 (alteration in original) (quoting *Pozzuoli*, 693 A.2d at 747).

In examining the Maine assault statute, we have previously observed that "[t]wo factors distinguish mere touchings from offensive physical contacts: the *mens rea* requirement, and the application of a 'reasonable person' standard to determine whether a contact is offensive." *Nason*, 269 F.3d at 19 (citations omitted). Accordingly, to recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact—something more than a mere touching—that a reasonable person would find to be offensive under the circumstances. *See* Me. Rev. Stat. tit. 17-A, § 35(3)(A); *Nason*, 269 F.3d at 19; *Pettengill*, 682 F. Supp. 2d at 56; *Pozzuoli*, 693 A.2d at 747. Moreover, the disregard of that risk "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev. Stat. tit. 17-A, § 35(3)(C).

B. The Meaning of "Use . . . Of Physical Force" Under Federal Law

1. The "Use" of "Force" and Common-Law Battery

The following discussion demonstrates that under the Lautenberg Amendment, the use-of-force requirement can be satisfied by an *actus reus* of an offensive touching, but such an offensive touch must be committed with a *mens rea* of intent rather than mere recklessness. In *Castleman*, the Supreme Court held that "force," for purposes of the Lautenberg Amendment, incorporates the common-law meaning of

"force." *Castleman*, 134 S. Ct. at 1410-11. The Court further stated that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411. On that basis, the Court held that "the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction"—including an offensive touching. *Id.* at 1413.

I agree with the government's contention that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence'" not only "the type of conduct that supports a common-law battery conviction," *id.* at 1411, but also the culpable mental states that support a battery conviction under the common law. *See, e.g., Freed*, 401 U.S. at 607-08 ("'(W)here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" (alteration in original) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999))). Thus, as urged by both parties here and as suggested by the Supreme Court in *Castleman*, I turn to examine the culpable mental states that attach to the common-law crime of battery. *See Castleman*, 134 S. Ct. at 1410-11.

In *Johnson*, the Supreme Court explained that "the common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another." *Johnson*, 559 U.S. at 139 (emphasis added). According to Supreme Court precedent, therefore, although the Lautenberg Amendment's "force" requirement can be satisfied by an *actus reus* of an offensive touching, such offensive contact must involve a *mens rea* of intent rather than mere recklessness. *See id.*; *see also Bailey v. United States*, 516 U.S. 137, 143 (1995) (defining the word "use" for purposes of the pre-1998 text of 18 U.S.C. § 924(c)—which had provided certain penalties if the defendant "uses or carries a firearm" during a crime of violence—and holding that such "use" required "active employment" and not "mere possession of a firearm"), *superseded by statute*, Bailey Fix Act, Pub. L. No. 105-386, 112 Stat. 3469 (1998), *as recognized in Abbott v. United States*, 562 U.S. 8 (2010); *Rembert*, 658 A.2d at 658 (stating that "[u]npermitted and intentional contacts . . . [are] actionable as an offensive contact"); *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427, 428 (Va. 1921) ("To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor."); *id.* at 428 (reasoning that when a man placed his hand on a woman's shoulder after she already rejected his romantic advances, the evidence was sufficient to justify a verdict of guilt for battery due to the defendant's "*willful* violation of the sanctity of her person" (emphasis added)); *Black's Law Dictionary* 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification").

The sources cited by the government do not demonstrate otherwise. These sources suggest, at best, that a common-law battery by "bodily injury" or "infliction of harm" can be committed recklessly; they do not establish that a common-law battery by "offensive physical contact" can be committed recklessly. *See, e.g.*, Model Penal Code § 211.1(1)(a) ("A person is guilty of assault if he . . . attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . . ."); Wayne R. LaFave, 2 *Substantive Criminal Law* § 16.2(a) (2d ed.) ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes."); *id.* § 16.2(c)(2) n.32 ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); *see also Commonwealth v. Hawkins*, 157 Mass. 551, 32 N.E. 862, 863 (1893) (stating that "the intent necessary to constitute" an offense of assault and battery is the "intentional doing of an action which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury," without saying anything regarding whether such an offense could be committed by causing offensive physical contact).

The weakness of the government's argument is revealed by its selective citation and selective quoting. For example, the government quotes a criminal law treatise for the proposition that "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness," but conveniently omits the immediately following clause at the end of that sentence: "—that is, where there is subjective awareness of the high risk of *physical injury*." LaFave, *supra*, § 16.2(c)(2) (emphasis added). The unabridged

sentence says nothing about whether a battery by *offensive touching* can be committed by recklessness. Indeed, in the same section, the cited treatise states that the modern approach "limit[s] battery to instances of physical injury." *Id.* § 16.2(a). Furthermore, the treatise explains that the Model Penal Code's assault provision "covers only causing 'bodily injury,' on the ground that '*offensive touching* is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided' elsewhere in the Code." *Id.* § 16.2(a) n.6 (quoting Model Penal Code § 211.1 cmt. at 185 (1980)). Given the foregoing, there is no justification for the majority's heavy reliance on the legislative history of the Lautenberg Amendment. *See, e.g., Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978)) (internal quotation marks and citation omitted)).

Contrary to the government's arguments, our decision in *United States v. Bayes*, 210 F.3d 64 (1st Cir. 2000), supports the conclusion that battery by offensive touching requires intent and not mere recklessness with respect to the offensiveness of the contact. In *Bayes*, we evaluated the defendant's challenge to the sufficiency of the evidence to support his conviction for simple assault under 18 U.S.C. § 113(a)(5). *Bayes*, 210 F.3d at 65. The factual basis for the offense was that the defendant, Christopher Bayes, while on a Delta Airlines flight from Atlanta to England, "'put his hand on [a flight attendant's] buttocks and rubbed [her] buttocks and grabbed at the bottom of [her] buttocks,'" which a nearby passenger described as Bayes "'reaching behind the flight attendant and grabbing her in the rear end'" and

"'squeezing.'" *Id.* at 66 (second and third alterations in original) (quoting trial testimony). "Bayes persisted in being unruly despite periodic warnings from members of the crew." *Id.* "A scuffle ensued, ending only after the captain dumped thousands of gallons of fuel, diverted the aircraft in mid-flight, and made an unscheduled landing [in Maine] so that Bayes could be taken off the plane. . . ." *Id.*

Bayes argued that simple assault required "a specific kind of intent that the government failed to prove." *Id.* Namely, Bayes contended that "the government did not prove that he intended to injure [the flight attendant] or to threaten her with harm when he touched her on the buttocks." *Id.* at 67. Because the statute in question, § 113(a)(5), criminalized "[s]imple assault" but did "not define that term in any way," we "turn[ed] to the common law for additional guidance." *Id.* at 67-68. We stated that "the common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched another in a *deliberately offensive* manner without a valid reason to do so." *Id.* at 69 (emphasis added). We reviewed prior opinions and determined that they "support the conclusion that, in a prosecution for simple assault under § 113(a)(5), it is sufficient to show that the defendant *deliberately touched another* in a *patently offensive manner* without justification or excuse." *Id.* (emphases added). Therefore, we held that the evidence supported Bayes's conviction because "the jury was entitled to conclude that Bayes had groped [the flight attendant] in a way that *could not have been accidental*, that *must have been deliberate*, and that was *patently offensive*." *Id.* (emphases added).

The preceding language from *Bayes* reveals that the *mens rea* required for a § 113(a)(5) battery-by-offensive-touching conviction is intent and not mere recklessness: the defendant must "deliberately" (and not accidentally) touch the victim in a "deliberately offensive" manner. *See id.* By contrast, under the Maine assault statutes, a defendant can commit the offense recklessly by merely disregarding (a) the risk that his conduct will cause physical contact (more than a mere touching) to occur, *and* (b) the risk that a reasonable person would find that physical contact to be offensive. *See* Me. Rev. Stat. tit. 17-A, § 35(3)(A). The "deliberate" intent that we required in *Bayes* is thus not necessary for a conviction for recklessly committed assault or domestic-violence assault in Maine.

Therefore, the following conclusion must be drawn: under the Lautenberg Amendment, the "force" requirement can be satisfied by an *actus reus* of an offensive touching, but such an offensive touch must involve a *mens rea* of intent rather than mere recklessness. That is, the defendant must *intend* to touch and *intend* that the touch be offensive, rather than merely disregard the risk that a touch will occur and be considered offensive. By contrast, the Maine statutes at issue permit conviction when the defendant merely disregards a risk that his or her conduct will cause physical contact that a reasonable person would find to be offensive. Accordingly, applying a categorical approach and the Supreme Court's statements in *Castleman* and *Johnson*, a conviction under either of the Maine assault statutes encompasses conduct beyond the common-law definition of battery, and thus does not necessarily establish a misdemeanor crime of domestic violence under the Lautenberg Amendment. This conclusion mandates

reversal here and is further supported by Footnote Eight of *Castleman* and the circuit court cases cited therein, as explained below.

2. *Castleman's* Footnote Eight

In *Castleman*, the Supreme Court opined that the "merely reckless causation of bodily injury under the [Tennessee assault statute] may not be a 'use' of force." *Castleman*, 134 S. Ct. at 1414. The Court explained this statement in Footnote Eight, noting that Leocal held that "'"use" requires active employment.'" *Id.* at 1414 n.8 (quoting *Leocal*, 543 U.S. at 9). The Court then stated that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," contrasting decisions from ten other circuit courts of appeals against our opinion in *Booker*, which the Supreme Court listed as the only outlier.[14] Together, as explained in more detail below, these cases establish that a predicate "crime of violence" under 18 U.S.C. § 16 and analogous provisions must be committed with a degree of intentionality greater than recklessness. Although § 16 is a different federal statute, its language is substantially similar to the

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[14] *Id.* To illustrate contrast with our holding in *United States v. Booker*, 644 F.3d 12, 19–20 (1st Cir. 2011), the Supreme Court cited the following circuit court decisions in *Castleman's* Footnote Eight: *United States v. Palomino García*, 606 F.3d 1317, 1335–36 (11th Cir. 2010); *Jiménez-González v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zúñiga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (en banc); *García v. Gonzales*, 455 F.3d 465, 468–69 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–65 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

definition of a misdemeanor crime of domestic violence for purposes of the Lautenberg Amendment. In particular, the definition in § 16(a) is nearly identical to the equivalent definition for § 922(g)(9). *Compare* 18 U.S.C. § 16(a) (defining the term "crime of violence" to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), *with* 18 U.S.C. § 921(a)(33)(A) (defining a "misdemeanor crime of domestic violence" as an misdemeanor offense that "has, as an element, the use or attempted use of physical force"). Keeping the similarity of the analogous statutes in mind, I review below each case cited by the Supreme Court in *Castleman's* Footnote Eight.

a. Second Circuit

The Second Circuit considered the issue in *Jobson v. Ashcroft*, 326 F.3d 367, 369 (2d Cir. 2003), which examined whether second-degree manslaughter in New York constituted a crime of violence under 18 U.S.C. § 16(b). A "crime of violence" is defined in § 16(b) as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).[15] The Second Circuit reiterated its

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[15] Given that § 16(b)'s definition includes offenses that merely "involve[] a *substantial risk* that physical force . . may be used," *id.* (emphasis added), its language is far more susceptible to a reading that it encompasses reckless conduct than is the equivalent language for § 16(a) and § 922(g)(9), which both require the "use" or "attempted use" of "physical force." *See supra* n.2; *see also* 18 U.S.C. § 16(a); *id.* § 922(g)(9); *id.* § 921(a)(33)(A); Me. Rev. Stat. tit. 17-A, § 35(3) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause

previous holding that "the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only *intentional* conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force.'" *Jobson*, 326 F.3d at 373 (internal quotation marks omitted) (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001)).

To satisfy § 16(b)'s definition of "crime of violence," therefore, a defendant must have risked having to *intentionally* use force to commit the offense. *Id.* at 374; *see also id.* at 373 ("[T]he risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end."). "By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of *pure* recklessness, may lack any 'intent, desire or willingness to use force or cause harm at all.'" *Id.* at 374 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992), *abrogated on other grounds by Begay v. United States*, 553 U.S. 137 (2008)). Accordingly, the Second Circuit concluded that second-degree manslaughter in New York is not a

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such a result. . . ."); Model Penal Code § 2.02(2)(c) ("A person acts recklessly . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Therefore, the cases holding that reckless conduct is insufficient to support a subsequent § 16(b) conviction provide even stronger support for the defendants' position than do the cases involving § 16(a). *Cf. Garcia*, 455 F.3d at 468 (reasoning that the "use" of "physical force" requires the *intentional* employment of physical force, and therefore holding that a New York second-degree reckless assault conviction "does not contain an element that there be the *intentional* employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S.C. § 16(a)").

crime a violence under § 16(b) and thus is not an aggravated felony justifying removal under the immigration laws. *Id.* at 376.

b. Third Circuit

The Third Circuit reached a similar result in *Oyebanji v. Gonzales*, 418 F.3d 260, 263 (3d Cir. 2005), which also involved immigration removal proceedings premised upon the definition of "crime of violence" under § 16(b). The petitioner's underlying conviction was for vehicular homicide under New Jersey law, which requires proof of recklessness. *Id.* The Third Circuit thus stated that it was "required to decide the very question that the *Leocal* Court did not reach"—"'whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16.'" *Id.* (quoting *Leocal*, 543 U.S. at 13).

Citing the *Leocal* Court's distinction between "violent" crime and merely "accidental" conduct, the Third Circuit explained that "[t]he quintessential violent crimes—murder, assault, battery, rape, etc.—involve the intentional use of actual or threatened force against another's person, and the term 'accidental' is most often used to describe events that did not 'occur [ ] as a result of anyone's purposeful act.'" *Id.* at 264 (second alteration in original) (citing *Black's Law Dictionary* 16 (8th ed. 1999)). The Third Circuit reasoned that "accidental" conduct "is not enough to qualify as a crime of violence" under *Leocal*, and it decided that such "accidental" conduct "would seem to include reckless conduct." *Id.* The panel further stated that the Third Circuit ought to follow the Supreme Court's "'considered dicta'" in *Leocal*, *id.* at 265 (quoting *McCoy*, 950 F.2d at 19), and that while the panel "appreciate[d]" the government's arguments, it

"believe[d] that those arguments must be directed to the Supreme Court or Congress." *Id.*

c. Fourth Circuit

The Fourth Circuit considered these issues in *García v. Gonzales*, 455 F.3d 465 (4th Cir. 2006). *García* also involved removal proceedings and whether a certain predicate offense qualified as an aggravated felony by virtue of being "a crime of violence" under 18 U.S.C. § 16. *Id.* at 468. The predicate offense considered in *García* was reckless assault in the second degree under New York law, which provides that "'[a] person is guilty of assault in the second degree when . . . (4) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.'" *Id.* (alterations in original) (quoting N.Y. Penal Law § 120.05). The Fourth Circuit summarily determined that the first definition of "a crime of violence" under § 16(a)—"an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—did not apply to the New York second-degree reckless assault conviction. *Id.* at 468 (quoting 18 U.S.C. § 16(a)). The court reasoned that the definition of the New York offense "does not contain an element that there be the *intentional* employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S.C. § 16(a)." *Id.* (emphasis added). Therefore, according to the Fourth Circuit, "the use . . . of physical force" requires the intentional employment of physical force. *See id.*

Turning to the definition in § 16(b), the Fourth Circuit held that "recklessness, like negligence, is not enough to support a determination that a crime is a 'crime of violence.'" *Id.* at 469. In making this

determination, the Fourth Circuit held that in order to satisfy § 16(b)'s requirement that the predicate offense "involve a substantial risk that physical force against the person or property of another may be used," the force must "be applied as a means to an end." *Id.* (quoting *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 447 (4th Cir. 2005)) (internal quotation marks omitted); *see also id.* ("[W]e are of opinion that 18 U.S.C. § 16(b) requires that the substantial risk involved be a substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury.").

d. Fifth Circuit

The Fifth Circuit considered the definition of "crime of violence" under 18 U.S.C. § 16(b) in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). In that case, the Fifth Circuit reasoned that § 16(b) requires that "the offender *intentionally* use the force against the person or property of another." *Id.* at 927. Because "*[i]ntentional* force against another's person or property is virtually never employed to commit" the offense of felony driving while intoxicated ("DWI") in Texas, the court held that "felony DWI is not a crime of violence as defined by 18 U.S.C. § 16(b)." *Id.*

e. Sixth Circuit

In *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006), the Sixth Circuit followed the "'considered dicta'" of *Leocal* and the reasoning of the Third and Fourth Circuits to hold that "a crime requiring only recklessness does not qualify as a 'crime of violence' under 18 U.S.C. § 16," nor, because it "uses identical language," under *U.S. Sentencing Guidelines Manual* (U.S.S.G.) § 2L1.2(b)(1).

f. Seventh Circuit

Similarly, the Seventh Circuit followed its sister circuits in holding that "reckless crimes are not crimes of violence under Section 16(b)." *Jiménez-González v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008). The Seventh Circuit found persuasive the Third Circuit's reasoning in *Oyebanji* that the use of physical force requires active employment and not merely negligent or accidental conduct. *Id.* (citing *Oyebanji*, 418 F.3d at 263). The Seventh Circuit further reasoned that "accidental and reckless crimes are not the type of 'violent' crimes Congress intended to distinguish as worthy of removal." *Id.* To support its holding, the Seventh Circuit emphasized the "primary distinction" that crimes of violence involve *intentional* conduct whereas most crimes of recklessness involve non-purposeful conduct. *See id.* at 561-62.

g. Eighth Circuit

Likewise, the Eighth Circuit stated that the *Leocal* "Court's reasoning suggests that crimes requiring only reckless disregard for the risk of physical injury to another are not crimes of violence under § 16." *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007). Examining Minnesota law, the Eighth Circuit determined that "a person can commit second-degree manslaughter without using force or risking the intentional use of force," because the crime can be committed recklessly. *Id.* at 616. Giving examples, the court explained that:

> A person can commit this crime by recklessly leaving a child alone with lit candles that later start a fire, by allowing a child to die of dehydration while in the person's care, by leaving explosives and blasting caps stored in an automobile

> where they are later ignited by the use of jumper cables, and, indeed, by driving drunk with 'culpable negligence' in a manner that causes the death of a passenger.

Id. (internal citations omitted). Therefore, the court held, "the 'use of force,' as *Leocal* interpreted that phrase, is not an element of a second-degree manslaughter conviction," meaning that the Minnesota second-degree manslaughter offense is not a crime of violence under § 16(a). *Id.* Turning to § 16(b), the court also held that second-degree manslaughter under Minnesota law does not "involve a risk that the perpetrator will intentionally use physical force in the course of committing the offense." *Id.* at 616-17. Because Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force or risking the intentional use of force, the Eighth Circuit held that it is not a crime of violence under § 16. *Id.* at 617.

h. Ninth Circuit

In *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006) (en banc), the Ninth Circuit held that a prior Arizona assault conviction did not constitute a crime of violence under § 16(a) because that federal statute "covers only those crimes involving intentional conduct," and thus the merely reckless use of force (as covered by the Arizona statute) was insufficient to establish a violation. *See also id.* ("Because the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another, we conclude the federal statute does not apply."). In so holding, the court "agree[d] with [its] sister circuits that the reasoning of

Leocal—which merely holds that using force negligently or less is not a crime of violence—extends to crimes involving the reckless use of force." *Id.* at 1129. The Ninth Circuit reasoned that *Leocal* emphasized that crimes of violence cannot be "'accidental.'" *Id.* (quoting *Leocal*, 543 U.S. at 9). The court defined "accidental" as "'[n]ot having occurred as a result of anyone's purposeful act,'" and it defined "purposeful" as "'[d]one with a specific purpose in mind.'" *Id.* at 1129-30 (alterations in original) (citing *Black's Law Dictionary* 16, 1298 (8th ed. 2004)). The Ninth Circuit further concluded that "[r]eckless conduct, as generally defined, is not purposeful." *Id.* at 1130.

"Even more clearly, reckless conduct as defined by Arizona law is not purposeful." *Id.* As support for this statement, the Ninth Circuit cited the Arizona criminal statute defining recklessness. *Id.* Under that statute, "'[r]ecklessly' means . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." Ariz. Rev. Stat. Ann. § 13-105 (10)(c). That "risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.* This definition of recklessness is substantially similar to the equivalent Maine definition, as well as the other definitions outlined in the chart in Part II(A)(1), *supra*. For purposes of § 16, the Ninth Circuit saw no important differences between negligence and recklessness, considering each *mens rea* to constitute the type of non-purposeful conduct that *Leocal* held was insufficient to establish a crime of violence involving the "use" of force. *Fernández-Ruiz*, 466 F.3d at 1129-30. The court reasoned that the "plain meaning" of the

word "use" denotes that "physical force is instrumental to carrying out the crime." *Id.* By contrast, the "subjective awareness" of risk that characterizes a reckless act "is not the same as the *intentional* use of physical force against the person of another." *Id.* The court further explained that "[t]he bedrock principle of *Leocal* is that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Id.* at 1132. Therefore, the Ninth Circuit concluded that recklessness is not "a sufficient mens rea to establish that a conviction is for a crime of violence under § 16." *Id.* at 1130.

i. Tenth Circuit

In *United States v. Zúñiga–Soto*, 527 F.3d 1110, 1113 (10th Cir. 2008), the Tenth Circuit considered whether the "crime of violence" enhancement provision under U.S.S.G. § 2L1.2 applied to the appellant's prior Texas state conviction for assaulting a public servant. Applying the commentary to this U.S.S.G. provision, the Tenth Circuit's "sole task" was to whether the appellant's "prior felony conviction qualifies as a crime of violence because the offense had as an element the *use* of physical force." *Id.* at 1115. Under the appellant's offense of conviction, a person commits an assault if he or she "intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1). On appeal to the Tenth Circuit, the appellant argued that "his prior conviction did not have as an element the use of physical force because the Texas assault statute's *mens rea* component could be satisfied by recklessness." *Zúñiga-Soto*, 527 F.3d at 1115. The Tenth Circuit agreed, citing *Leocal*, its own precedent,

and "the persuasive reasoning of [its] sister circuits." *Id.* at 1113, 1123.

j. Eleventh Circuit

Finally, applying similar reasoning, the Eleventh Circuit also relied on *Leocal* and the decisions of the other circuit courts to hold that "a conviction predicated on a *mens rea* of recklessness does not satisfy the 'use of physical force' requirement under [U.S.S.G.] § 2L1.2's definition of 'crime of violence.'" *United States v. Palomino García*, 606 F.3d 1317, 1336 (11th Cir. 2010). Citing "the near unanimity of the circuit courts on this issue," the Eleventh Circuit concluded that *Leocal* "plainly suggests that crimes requiring only a reckless[] disregard for the risk of physical injury to others are not crimes of violence." *Id.* at 1336 n.16. The Eleventh Circuit further explained that "[b]ecause Arizona law defines recklessness as nothing more than the conscious disregard of a substantial and unjustifiable risk, this is more akin to negligence and cannot be said to require the *intentional* use of force." *Id.* at 1336 (internal citation omitted). Therefore, the court held that an Arizona conviction "predicated on the reckless causation of physical injury does not qualify as a crime of violence under [U.S.S.G.] § 2L1.2." *Id.*

C. Comparison of Analogous Statutory Language

As is evident from the discussion above, most of our sister circuits have held that the "use . . . of physical force" requires the type of intentional conduct for which mere recklessness cannot suffice. Although these cases involved different provisions than the Lautenberg Amendment, the statutory texts involved are not materially different, and in many cases, are virtually identical. As referenced herein, analogous

provisions to the definition of "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment are compared in the following chart:

Statute	Relevant Language
"misdemeanor crime of domestic violence," Lautenberg Amendment, 18 U.S.C. § 922(g)(9)	"has, as an element, the use or attempted use of physical force" 18 U.S.C. § 921(a)(33)(A)
"crime of violence," 18 U.S.C. § 16(a)	"has as an element the use, attempted use, or threatened use of physical force against the person or property of another" 18 U.S.C. § 16(a)
"crime of violence," 18 U.S.C. § 16(b)	"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" 18 U.S.C. § 16(b)
"[c]rime of violence," U.S.S.G. § 2L1.2	"[an] offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another" U.S.S.G. § 2L1.2, cmt. 1(B)(iii).
"violent felony" under the ACCA, 18 U.S.C. § 924(e)(1)	"has as an element the use, attempted use, or threatened use of physical force against the person of another" 18 U.S.C. § 924(e)(2)(B)(I)

It is readily apparent that the language involved in most of the preceding provisions is nearly identical, and for present purposes is materially indistinguishable.[16] Moreover, I do not doubt that the Supreme Court was well aware that the cases it cited in *Castleman's* Footnote Eight involved different provisions, yet the Court nonetheless contrasted the holdings of our sister circuits in those cases with our holding in *Booker* before remanding the instant cases to us for reconsideration in light of *Castleman*. *See Castleman*, 134 S. Ct. at 1414 n.8. Thus, to the Supreme Court, these cases and provisions were sufficiently analogous to justify the instant remand. *Cf. Smith*, 544 U.S. at 233 ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning

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[16] The majority claims that § 16(a) is "not analogous" to § 922(g)(9). *Ante*, at 12. I disagree, given that these two provisions contain nearly identical language. Section 16(a) defines a "crime of violence," whereas § 922(g)(9) involves a "misdemeanor crime of domestic violence." The relevant definition for § 922(g)(9) is an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). The definition under § 16(a) is materially indistinguishable: an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 16(a). This definition differs only in the addition of the "threatened use" of physical force as an alternative, and the explanation that the force be used "against the person or property of another." The former difference (the inclusion of "threatened use") is neither implicated in the current case nor in any of the analogous precedents referenced herein. The latter change appears to be largely a distinction without a difference, as it is difficult to contemplate how or why the "use of physical force" for purposes of § 922(g)(9) would mean force used in any way other than "against the person or property of another."

in both statutes."); *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (stating that "[t]he similarity of language" in two statutory provisions sharing "a common raison d'etre" constitutes "a strong indication that the two statutes should be interpreted pari passu"). The government and the majority fail to persuasively establish that the meaning of "the use . . . of physical force" in these various federal definitions of a "crime of violence" should be so similar in every other context, yet so different as to be outcome-determinative in the instant context. For those reasons, I find the foregoing precedent more persuasive than the majority opinion here. I thus agree with our sister circuits that the "use . . . of physical force" for a "crime of violence" requires the intentional, and not merely reckless, employment of physical force. I find this conclusion to be particularly true for the subsumed offense at issue in the instant case: the combination of a *mens rea* of "recklessness" with an *actus reus* of "offensive physical contact." *Cf. Nason*, 269 F.3d at 19 (stating that the *mens rea* requirement is one of two factors that "distinguish mere touchings from offensive physical contacts").

III. CONCLUSION

Despite the foregoing precedent from the Supreme Court and our sister circuits, the majority opinion nonetheless seeks to hew to our prior decision in *Booker* and to resolve these cases, yet again, exactly as we did in *Armstrong I* and *Voisine I*. With due respect, for the reasons explained above, I believe that the majority is wrong.

The Lautenberg Amendment is premised upon grave concerns and laudable purposes, as articulated both by the Supreme Court in *Castleman* and by the

majority in this case. I share those concerns and strongly agree with those purposes. However, a general agreement with those goals need not dictate the result here. This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence. Were our job so simple, it would be an easy matter to decide in favor of the government. But that is not our role. Our judicial obligations preclude us from such results-oriented decision making.

Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation. This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends. That is, does the language chosen by Congress—the "use or attempted use of physical force"—necessarily apply to all Maine misdemeanor assault convictions for recklessly causing offensive physical contact? Applying the relevant precedent to this question of statutory interpretation counsels that we answer this inquiry in the negative and resolve this appeal in favor of the defendants. I conclude that the particular subsumed Maine offense at issue here, the reckless causation of offensive physical contact, does not necessarily require the "use . . . of physical force" and thus does not categorically constitute a misdemeanor crime of domestic violence under the Lautenberg Amendment.

For the reasons stated herein, I would reverse the defendants' convictions. Indeed, I believe that the Supreme Court has obligated us to do so. Therefore, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 12-1213
12-1216

UNITED STATES OF AMERICA,
Appellee,

v.

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,
Defendants, Appellants.

Before

Lynch, *Chief Judge*,
Torruella, Stahl, Howard, Thompson, Kayatta
and Barron, *Circuit Judges*.

ORDER OF COURT
Entered: March 31, 2015

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

TORRUELLA, *Circuit Judge*, Dissenting. I dissent from the denial of en banc hearing, as I believe that this case meets our standards for rehearing for a conflict of law, and for the reasons explained in my dissent to the panel opinion.

By the Court:

/s/ Margaret Carter, Clerk

cc: Ms. Bunker, Ms. Malone, Mr. Lowell, Ms. McGaughey & Ms. Villa

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed March 11, 2011]

Criminal No. 1:11-cr-17-JAW
(18 U.S.C. § 922(g)(9) & 16 U.S.C. § 668)

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

INFORMATION

The United States Attorney charges:

COUNT ONE

On about October 18, 2009, in the District of Maine, the defendant,

STEPHEN L. VOISINE

having been convicted of a misdemeanor crime of domestic violence, specifically, the crime of assault in violation of Section 207 of Title 17-A of the Maine Revised Statutes Annotated in *State of Maine v. Stephen L. Voisine*, Docket Number 2003-210 (Maine District Court, Houlton), knowingly possessed in or affecting commerce a Remington, Model 7400, .30-06 caliber rifle bearing serial number B8150483, in violation of Title 18, United States Code, Section 922(g)(9).

COUNT TWO

On about October 18, 2009, in the District of Maine, the defendant,

STEPHEN L. VOISINE

within the United States and without being permitted to do so as required by law, did knowingly and with wanton disregard for the consequences of his act, shoot at and kill a bald eagle, commonly known as the American eagle (*Haliaeetus leucocphalus*), in violation of Title 16, United States Code, Section 668(a).

Dated: 2/10/11

/s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant United States Attorney

State Of Maine — District Court
Aroostook, SS. — District I
Criminal Action — Division Of Southern Aroostook
Docket No. HOUDC—CR—2003—210

STATE OF MAINE

v.

STEPHEN L. VOISINE

BEFORE:

The Honorable Bernard O'Mara, Judge of the District Court, in Houlton, Maine, on February 2, 2004.

APPEARANCES:

Suzanne Lilley,
Esq. For the State

Jeffrey Pickering,
Esq. For the Defendant

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[2] (This matter came for hearing before the Honorable Bernard O'Mara, Judge of the District Court, in Houlton, Maine, on February 2, 2004.)

COURT: Stephen Voisine.

JEFFREY PICKERING, ESQ.: It's for plea, Your Honor. We have a negotiated disposition on that, as well.

COURT: Oh, this matter was returned to the docket.

(Attorneys conferring)

COURT: And the plea today?

* * *

MR. PICKERING: A plea of guilty, Your Honor.

COURT: And the agreed disposition?

SUZANNE LILLEY, ESQ.: Two-hundred-dollar fine, Your Honor.

COURT: Is that your understanding, sir?

STEPHEN VOISINE, THE DEFENDANT HEREIN: Yes.

COURT: Are you prepared to take care of that today?

MR. PICKERING: Your Honor, he-he's-he will be unable to today. He's unemployed and there's a pending disability application. He needs sixty days. He could possibly have it before that, but sixty days to be sure.

COURT: So, if I gave him to April 12th?

(Attorney—client confer)

MR. PICKERING: Yeah, that would be fine.

COURT: 9:30 in the morning, sir. At 9:30 on April 12th, you're to have it paid by then or be here.

[3] MR. VOISTNE: Mm—hmm.

(Attorney—client confer)

END OF HEARING

CERTIFICATION

I HEREBY CERTIFY that the foregoing, pages 2 through 3, is a true transcript of Tape Number 1663, Index Numbers 5897 through 5976, recorded on February 2, 2004, at the Maine District Court located at Houlton, Maine, of the case entitled *STATE OF MAINE v. STEPHEN L. VOISINE*.

Dated: September 24, 2010

/s/ Brenda J. Cheney
Brenda J. Cheney
TRANSCRIBER

A TRUE COPY, dated at Bangor, Maine, this 24th day of September, A.D., 2010.

/s/ Brenda J. Cheney
Notary
Maine District Court

State Of Maine
Aroostook, Ss.

District Court
Location: Houlton
Docket No. CR—2003—210

STATE OF MAINE

v.

STEPHEN L. VOISINE
DOB: [redacted]60
SIN:
[redacted]
Wytopitlock, ME 04497
G: Male Ht: 5' 10" Wt: 210 H: Brown
E: Blue R:White

COMPLAINT
(ATN: 069903 A)

COUNT 1: ASSAULT

The undersigned officer, being duly sworn, states upon information and belief that:

COUNT 1: 17—A M.R.S.A. §207 (1)(A)
ASSAULT
CLASS D

On or about April 12, 2003, in Wytopitlock, Aroostook County, Maine, STEPHEN L VOISINE, did intentionally knowingly or recklessly cause bodily injury or offensive physical contact to Tina M. Farwell. The crime involved domestic violence.

/s/ Illegible
COMPLAINANT

Sworn to before me, 6/2, 2003

/s/ Illegible
Clerk/Complaint ~~Justice/Judge~~

OFFICER: Daniel Deschaine
DEPT: Maine State Police
ARRAIGNMENT: June 16, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:11-cr-00017-JAW

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

ORDER ON MOTION TO DISMISS

On March 11, 2011, Stephen L. Voisine pleaded guilty to both counts of a two count information. Count I charged him with possession of a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) and Count II charged him with shooting and killing a bald eagle in violation of 16 U.S.C. § 668(a). *Information* (Docket # 2). On March 15, 2011, Mr. Voisine moved to dismiss Count I of the information. *Mot. to Dismiss Count I of the Information* (Docket # 10). The Government responded on April 5, 2011, and Mr. Voisine replied to the response on April 11, 2011. *Gov't's Resp. to Def.'s Mot. to Dismiss* (Docket # 12); *Def.'s Reply to Gov't's Resp. to Mot. to Dismiss* (Docket # 13).

Mr Voisine first claims that the charge infringes his Second Amendment right to bear arms. He next contends that the information fails to state a federal offense because the First Circuit's decision in *United States v. Nason*,[1] which concluded that a conviction

[1] 269 F.3d 10 (2001).

under Maine's assault statute constitutes a "misdemeanor crime of domestic violence" under federal law, is no longer binding on this Court. Instead, he asserts that in interpreting the term, "physical force," as it appears in the firearms possession statute, the Court must apply the construction the United States Supreme Court in *Johnson v. United States*[2] and the First Circuit in *United States v. Holloway*[3] gave the same term for purposes of the Armed Career Criminal Act (ACCA), and if it does so, Count I must be dismissed because the Defendant has not committed a predicate crime.

The Court considered these exact issues in denying a motion to dismiss the indictment in *United States v. Bryant*, 1:11-cr-00021-JAW. In fact, the legal arguments presented by both Mr. Voisine and the Government in this motion are precisely the same as those presented in *Bryant*. Moreover, there are no factual differences distinguishing this case from *Bryant*. Accordingly, the Court incorporates its reasoning in *Bryant* and DENIES Mr. Voisine's Motion to Dismiss Count I of the Information (Docket # 10).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 14th day of April, 2011

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[2] 130 S. Ct. 1265 (2010).

[3] 630 F.3d 252 (1st Cir. 2011).

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:11-cr-00021-JAW

UNITED STATES OF AMERICA

v.

TROY BRYANT

ORDER ON MOTION TO DISMISS

Troy Bryant moves to dismiss the indictment charging him with possession of ammunition after having been convicted of a misdemeanor crime of domestic violence. He first claims that the charge infringes his Second Amendment right to bear arms. He next contends that the indictment fails to state a federal offense because the First Circuit's decision in *United States v. Nason*,[4] which concluded that a conviction under Maine's assault statute constitutes a "misdemeanor crime of domestic violence" under federal law, is no longer binding on this Court. Instead, he asserts that in interpreting the term, "physical force," as it appears in the firearms possession statute, the Court must apply the construction the United States Supreme Court in *Johnson v. United States*[5] and the First Circuit in *United States v. Holloway*[6] gave the same term for purposes of the Armed Career Criminal Act (ACCA), and if it does so, the indictment

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[4] 269 F.3d 10 (2001).

[5] 130 S. Ct. 1265 (2010).

[6] 630 F.3d 252 (1st Cir. 2011).

must be dismissed because the Defendant nas not committed a predicate crime. The Court has previously considered and rejected most of these arguments and does so again. As regards *Johnson* and *Holloway*, the Court does not consider judicial interpretations of the ACCA to be sufficiently persuasive to disturb the binding power of First Circuit precedent on the question of the definition of "physical force" for purposes of federal firearms possession prohibitions. The Court denies the Defendant's motion.

I. BACKGROUND

A. Procedural Background

On February 24, 2011, a federal grand jury indicted Troy Bryant for possessing ammunition after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9).[7] *Indictment* (Docket # 13). On March 11, 2011, Mr. Bryant moved to dismiss the indictment. *Mot. to Dismiss Indictment* (Docket # 20) (*Def.'s Mot.*). On April 1, 2011, the Government responded, and on April 4, 2011, Mr. Bryant replied. *Gov't's Resp. to Def.'s Mot. to Dismiss* (Docket # 24) (*Gov't's Resp.*); *Def.'s Reply to Gov't's Resp. to Mot. to Dismiss* (Docket # 25) (*Def.'s Reply*).

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[7] 18 U.S.C. § 922(g)(9) makes it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any . . ammunition." According to the indictment, Mr. Bryant was convicted in 2005 of a misdemeanor crime of domestic violence in violation of 17-A M.R.S. § 207. *Indictment* at 1.

II. DISCUSSION

A. Motion to Dismiss Indictment

A Court should exercise its authority to dismiss cautiously since to dismiss an indictment 'directly encroaches upon the fundamental role of the grand jury.'" *United States v. Pettengill*, 682 F. Supp. 2d 49, 51 (D. Me. 2010) (quoting *United States v. Thomas*, 519 F. Supp. 2d 141, 143-44 (D. Me. 2007)). The power is "appropriately reserved, . . . for extremely limited circumstances. *Whitehouse v. United States Dist. Court*, 53 F.3d 1349, 1360 (1st Cir. 1995). "Unless the Government has made what can fairly be described as a full proffer of the evidence it intends to present at trial to satisfy the jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment." *Pettengill*, 682 F. Supp. 2d at 51 (quoting *United States v. Alfonso*, 143 F.3d 772, 776-77 (2nd Cir. 1998)).

B. The Second Amendment

Mr. Bryant first argues that 18 U.S.C. § 922(g)(9) violates the Second Amendment. *Def.'s Mot.* at 2-8. He acknowledges that the Court "previously considered, and rejected, this basis to dismiss an Indictment charged pursuant to . . . §922(g)(9) by way of the order entered in *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008); *United States v. Wyman*, 667 F. Supp. 2d 151 (D. Me. 2009); and *United States v. Pettengill*, 682 F. Supp. 2d 49 (D. Me. 2010)." *Def.'s Mot.* at 5. He nevertheless challenges those rulings on two grounds: (1) the rulings employed improper levels of scrutiny; and (2) they were based on a flawed construction of § 922(g)(9). The Court stands by its constitutional analyses in those cases. As to the latter challenge,

until the First Circuit directs otherwise, the Court concludes that its construction of § 922(g)(9) in *Booker*, *Wyman*, and *Pettengill* remains good law in this District.

C. Failure to State a Federal Offense

Mr. Bryant argues that the indictment fails to state a federal offense by failing to allege a predicate crime under § 922(g)(9). To be convicted of violating § 922(g)(9), the defendant must have been previously convicted of a misdemeanor crime of domestic violence. The indictment alleges that Mr. Bryant had been previously convicted of such a crime, specifically a violation of Maine's assault statute, 17-A M.R.S. § 207. However, Mr. Bryant argues that a conviction under Maine's assault statute, without more, does not necessarily meet the federal definition of a misdemeanor crime of domestic violence because it does not require the same *mens rea* or level of physical force.[8]

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[8] Mr. Bryant argues that consistent with *Taylor v. United States*, 495 U.S. 575, 595 (1990) and *Shepard v. United States*, 544 U.S. 12, 26 (2005), the Court must employ the First Circuit's two-tiered categorical approach in determining whether his prior conviction meets the definition of "use or attempted use of physical force." *Def.'s Mot.* at 8-9. The two-tiered approach turns first to the statutory language to determine whether the statute "sweeps more broadly" than the qualifying definition, and if so, turns next to whether the record of conviction establishes the factual basis for the conviction. *United States v. Miller*, 478 F.3d 48, 50 (1st Cir. 2007). In *Booker*, this Court agreed that the *Taylor/Shepard* approach, as refined by the First Circuit, would apply "with equal force to determine if a person has been convicted of a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. § 921(a)(33)." *Booker*, 555 F. Supp. 2d at 223. Here, the Government attached to its response the court documents for Mr. Bryant's assault conviction. *Gov't's Resp.* Attach. 1-3. But they are unrevealing. The Government also

Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" for purposes of §922(g)(9) as:

> . . . an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

17-A M.R.S. § 207 states in part:

> 1. A person is guilty of assault if:
>
> A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.

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attached a copy of the police report, which is revealing but may not be considered under *Shepard*. 544 U.S. at 26; *United States v. Cadieux*, 500 F.3d 37, 43 (1st Cir. 2007) ("The Court, however, rejected the use of a police report as a basis for judicial fact-finding because permitting a sentencing judge considering an [Armed Career Criminal Act] enhancement to make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea raises Sixth and Fourteenth Amendment concerns") (internal punctuation omitted). In this case, therefore, the Court agrees with Mr. Bryant that the court-sanctioned documents do not clarify under which level of *mens rea* or degree of force Mr. Bryant acted when he committed the domestic assault.

Mr. Bryant contends that intentionality must be an element of the predicate crime for the crime to fit the definition of "misdemeanor crime of domestic violence" and observes that "recklessness" satisfies the *mens rea* requirement for conviction under § 207. *Id.* at 8. He further notes that one can be convicted of violating § 207 for merely offensive contact, which he argues does not necessarily rise to the level of "use or attempted use of physical force" within the meaning of a "misdemeanor crime of domestic violence."[9] *Id.* at 8-

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[9] Mr. Bryant discusses *State v. Patterson*, 2004 ME 79, 851 A.2d 521, to demonstrate how minimal the "offensive physical contact" may be under the Maine assault statute. In *Patterson*, a boyfriend arrived home to find a spot in newly-installed carpet. *Id.* 2004 ME 79, ¶ 3, 851 A.2d at 522. He became irritated and commented as he attempted to clean the spot. *Id.* The comments provoked the girlfriend and she took a piece of pizza and rubbed it into the carpet. *Id.* In response, the boyfriend picked up his girlfriend, carried her outside, and left her there. *Id.* Although characterizing the crime as of "a minimal nature," the district judge found the boyfriend guilty of assault and sentenced him to "simply the conviction" and a small fine. *Id.* 2004 ME 79, ¶ 9, 851 A.2d at 523. Although Mr. Bryant does not mention it, the Maine Supreme Judicial Court vacated the conviction and remanded the case based on the District Court's erroneous interpretation of 17-A M.R.S. § 105, which allows a person to use nondeadly force to the extent he reasonably believed it necessary to prevent what reasonably appeared to be an unlawful taking of his property or criminal mischief. Id. 2004 ME 79, ¶ 14-15, 851 A.2d at 524-25.

Mr. Bryant also does not mention that after Patterson was remanded, the case returned to the Maine Supreme Judicial Court. *State v. Patterson*, 2005 ME 55, 881 A.2d 649 (*Patterson II*). After the initial remand, the District Court had reinstated the conviction and Mr. Patterson appealed again. Again the Maine Supreme Judicial Court vacated. *Id.* In *Patterson II* , the Law Court noted that in the context of a section 105 defense, "[b]ecause recklessness is the minimum required mens rea requirement for assault pursuant to 17-A M.R.S. § 207(1)(A), the State was required to prove beyond a reasonable doubt that

10 (citing 18 U.S.C. § 921(a)(33)(A)(ii)); *Def.'s Reply* at 1 (clarifying that his challenge to using a § 207 conviction as a predicate misdemeanor to a § 922(g)(9) charge was based not only on the *mens rea* issue, but also the contention that "offensive contact" does not necessarily amount to "physical force"). This Court has previously addressed these issues and no intervening case law changes the outcome.

1. The First Circuit's Holding in *Nason*

In *United States v. Nason*, the First Circuit rejected the same *mens rea* and level of force arguments Mr. Bryant raises here. 269 F.3d 10 (2001). The *Nason* Court considered whether conduct violating the "offensive physical contact" prong of § 207 "necessarily involves the use or attempted use of physical force" such that convictions under that prong may qualify as predicate offenses under §922(g)(9). Id. at 11-12. It held that "all convictions under [17-A M.R.S. § 207] qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)." *Id.* at 21. The *Nason* Court explained that "Congress intended section 922(g)(9) to encompass crimes characterized by the application of any physical force." *Id.* at 18.

Patterson's beliefs that led to his actions 'when viewed in light of the nature and purpose of [his] conduct and the circumstances known to [him], [were] grossly deviant from what a reasonable and prudent person would believe in the same situation.'" *Patterson II*, 2005 ME 55, ¶ 8, 881 A.2d at 651 (quoting 17-A M.R.S. § 105).

Although Mr. Bryant's point is well taken about the minimal nature of the offensive physical contact that may sustain an assault conviction, the Patterson cases also reflect that a conviction for minimal offensive physical contact may be more difficult under Maine law than Mr. Bryant allowed.

Mr. Bryant argues that *Nason* "does not address the intent issue presented by Congress's selection of the term 'use of force.'" *Def.'s Mot.* at 11. The Court disagrees. In *Nason*, the First Circuit reviewed the decisions of the Maine Supreme Judicial Court, which addressed "offensive physical contact" under § 207, and concluded that the phrase involves "something less than bodily injury" but more than "mere touching." *Nason* 269 F.3d at 19 (quoting *State v. Pozzouli*, A.2d 745 (Me. 1997)). The First Circuit cited § 207's "*mens rea* requirement" as one of the distinctions between offensive physical contact and mere touching. *Id.* In other words, the *Nason* Court considered § 207's *mens rea* requirement as a factor harmonizing its elements with the definition of misdemeanor crime of domestic violence. Moreover, although Mr. Bryant emphasizes the word "use" preceding the phrase "physical force," suggesting it supplies an intentionality element to the definition of misdemeanor crime of domestic violence, *see Def.'s Mot.* at 9, the *Nason* Court found that "offensive physical contacts with another person's body categorically involve the use of physical force." 269 F.3d at 20. Because knowing and reckless are expressly sufficient *mentes reae* for offensive physical contact under § 207, the First Circuit implicitly rejected the idea that intentionality is an essential element of "use of physical force."

Finally, Mr. Bryant cites no First Circuit case law for the assertion that intentionality is a required element of misdemeanor crimes of domestic violence. Although he points to the case law of other circuits, which have focused on the level of force necessary to constitute "physical force," *see Def.'s Mot.* at 9-11 (citing *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) and *United States v. Belless*, 338 F.3d 1063 (9th

Cir. 2003)), Mr. Bryant has not directed the Court to any circuit discussion of intentionality. *Id.* In short, the Court remains bound by First Circuit precedent and is unconvinced that the decisions of other circuits presage a change in First Circuit law sufficient to "loosen the iron grip of *stare decisis*." *United States v. Reveron Martinez*, 836 F.3d 684, 687 n.2 (1st Cir. 1988). In fact, in *United States v. Duval*, 496 F.3d 64, 84-85 (1st Cir. 2007), addressing the meaning of "violent felony" under the ACCA, a three-judge panel of the First Circuit itself observed that "[u]ntil such time as we revisit *Nason en banc*, we are bound to apply its holding that even 'offensive contact' constitutes a violent felony under Maine's assault and battery statute." (internal citation omitted).

2. Developments in the Law Since *Nason*

Mr. Bryant argues that intervening case law has overruled *Nason*. His argument highlights the term "physical force", which appears in the ACCA and in the definition of misdemeanor crime of domestic violence. The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that

> (i) has as an element the use, attempted use, or threatened use of *physical force* against the person of another; or
>
> (ii) is a burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B) (emphasis supplied). As noted earlier, the statutory definition of misdemeanor crime of domestic violence contains the same term: "an offense that . . . has, as an element, the use or

attempted use of *physical force* . . . ." 18 U.S.C. § 921(a)(33)(A) (emphasis supplied). Mr. Bryant says that the Court must apply judicial interpretations of "physical force" under the ACCA to "physical force" under the definition of misdemeanor crime of domestic violence and that when the same interpretation is applied, Mr. Bryant's state conviction cannot serve as a predicate crime for a conviction under 18 U.S.C. § 922(g)(9).

Mr. Bryant's argument is premised on his assertion that in *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Supreme Court effectively overruled *Nason*. In *Johnson*, the Court held that a defendant's prior battery conviction under Florida law was not a "violent felony" under the ACCA. *Id.* at 1265. The *Johnson* Court stated that, "in the context of a statutory definition of 'violent felony' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 1272 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)). The *Johnson* Court held that such force was not a prerequisite for conviction under Florida's battery statute, which could be "satisfied by *any* intentional physical contact, 'no matter how slight.'" *Id.* at 1269-1270 (quoting *State v. Hearns* 961 So. 2d 211, 218 (Fla. 2007)).

For support, Mr. Bryant points to some stray judicial comments anticipating that in interpreting the meaning of "violent felony" in the ACCA, the Supreme Court might illuminate the meaning of "misdemeanor crime of domestic violence." *See Def.'s Mot.* at 9-13; *see also Duval*, 496 F.3d at 85 (incorporating the First Circuit's reasoning in *Nason* to its review of a district courts determination "that a conviction in Maine for simple assault constitutes a

crime of violence for the purposes of the ACCA"); *United States v. Pettengill*, 682 F. Supp. 2d 49, 57-58 (D. Me. 2010) (addressing defendant's request that the motion be held in abeyance pending the disposition of Johnson, the Court noted that "there is no guarantee that when the Supreme Court issues its opinion in *Johnson*, it will resolve the issues before the Court"); *United States v. Wyman*, 667 F. Supp. 2d 151, 154 n.4 (D. Me. 2009) ("Though not precisely the same question presented here or in *Booker*, the Supreme Court's decision in *Johnson* could inform the First Circuit's position in *Nason*"). More specifically, Mr. Bryant argues that *Duval* established that "the ACCA must be read in the same manner as § 922(g)(9)." *Def.s Mot.* at 13.

The Court disagrees. In *Duval*, the First Circuit reviewed a district court's determination that a defendant's conviction under § 207 constituted a violent crime for purposes of the ACCA. 496 F.3d at 84-85. The *Duval* Court explained that it reviewed the district court's determination for "plain error." Under that standard, it was the defendant's burden to show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *United States v. Bennett*, 469 F.3d 46, 51 (1st Cir. 2006)). Noting that *Nason* was the only case cited by either party for guidance on the interpretation of § 207, the *Duval* Court stated that it could not "distinguish it in any meaningful way from the circumstances of [the defendant]'s case," and concluded that it was "bound to apply its holding that even 'offensive contact' constituted a violent felony under Maine's assault and battery statute." *Id.* at 85. Moreover, the *Duval* Court concluded that *Nason* was

still binding law in the First Circuit. *Id.* The Court does not read *Duval*, as Mr. Bryant suggests, as mandating a wholesale importation of its construction of the ACCA into the definition of "misdemeanor crime of domestic violence." Rather, the *Duval* Court's decision was grounded on the twin doctrines of plain error and *stare decisis*. *Id.* at 84-85.

Nor would Mr. Bryant's argument find support in *Johnson*. The *Johnson* Court's construction of "physical force" in the ACCA context is narrower than the First Circuit's construction of "physical force" in the § 921(a)(33)(A) context, which includes "any physical force, regardless of whether that force resulted in bodily injury or risk of harm." *Nason*, 269 F.3d at 16-17. In *Johnson*, the Supreme Court strongly indicated that the respective statutes harbor distinct meanings of "physical force." The *Johnson* Court emphasized that its holding was limited to the definition of "physical force" in the context of the ACCA. 130 S. Ct. at 1271-1273. It expressly stated that "[w]e do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it." *Id.* at 1273. The Supreme Court, therefore, expressly declined to endorse Mr. Bryant's view that the phrase "physical force" has the same meaning in both contexts.

Moreover, the *Johnson* Court's emphasis of the word "misdemeanor" highlights the distinction between two separate statutory meanings of physical force: (1) physical force as an element of a violent felony and (2) physical force as an element of a misdemeanor crime of domestic violence. The two meanings are elements of distinct categories of crimes assigned separate levels of criminality. It stands to reason that

the degree of force Congress deemed necessary to constitute an element of a violent felony is greater than that necessary to constitute a misdemeanor.

To the extent *Johnson* addressed the question, the Supreme Court suggested that the same phrase in the two statutes could have different meanings. The *Johnson* Court elaborated on the variant meanings of "physical force." It noted that an element of the common law crime of battery was "the intentional application of unlawful force against the person of another." *Id.* at 1270. The element could be "satisfied by even the slightest offensive touching." *Id.* The Supreme Court determined that the common law definition did not fit the ACCA context where the term "force" was accompanied by the modifiers "physical" and "violent." *Id.* at 1271. The Supreme Court also attributed significance to the term "felony" in the ACCA meaning. *Id.* It observed that "even today a simple battery—whether of the mere-touching or bodily-injury variety—generally is punishable as a misdemeanor," and concluded that "[i]t is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of misdemeanor." *Id.* 1271-72. That "physical force" "normally connotes force strong enough to constitute 'power'" is "all the more so when it is contained in a definition of 'violent felony.'" *Id.* This reasoning indicates the Supreme Court's recognition that Congress assigns the term "force" different meaning in the felony context than in the misdemeanor context.

For the same reason, the First Circuit's holding in *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011), does not disturb its holding in *Nason*. In *Holloway*, the First Circuit considered "whether a

federal court may conclude that a conviction under Massachusetts's simple assault and battery statute qualifies as a violent felony under the ACCA." *Id.* at 254. It is true, as Mr. Bryant contends, that following *Johnson*, the First Circuit overruled *United States v. Mangos*, 134 F.3d 460 (1st Cir. 1998), which had held that "did assault and beat" charging language "suffices to identify the harmful brand of battery for purposes of sentencing under either the ACCA or the career offender provision of the U.S. Sentencing Guidelines." *Holloway*, 630 F.3d at 257. The *Holloway* Court concluded that in view of Johnson and Massachusetts state interpretations of the scope of the assault and battery statute, "a sentencing court may not rely on the generic 'did assault and beat' charging language to identify which particular battery offense served as the offense of conviction." *Id.* at 260.

Holloway is no more than the First Circuit's declared allegiance to the Supreme Court's directive in *Johnson*. As the Government correctly observes, "[t]here was simply no discussion of § 922(g)(9) or any attempt to define misdemeanor crime of domestic violence." *Id.* After *Johnson*, the Court will not incorporate the construction of "physical force" under the definition of "violent felony" in the ACCA to its analysis of "physical force" under the definition of "misdemeanor crime of domestic violence" in the firearms possession prohibition.

In sum, the holding in *Nason* that "all convictions under [17-A M.R.S. § 207] qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)," 269 F.3d at 21, remains the law in this Circuit and binding on this Court. *Holloway*, 630 F.3d at 258. Therefore, the indictment states a federal

offense because Mr. Bryant is alleged to have possessed ammunition after having been convicted of a recognized predicate offense.

III. CONCLUSION

The Court DENIES Mr. Bryant's Motion to Dismiss the Indictment (Docket # 20).

SO ORDERED

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 13th day of April, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 11-CR-00017-B-W

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

CONDITIONAL PLEA
(Rule 11(a)(2))

My plea of guilty is conditional in that I reserve the right, on appeal from the judgment herein, to have an appellate court review this court's decision dated April 14, 2011, on my Motion to Dismiss Count One of the information.

Date: 4/22/2011 /s/ Stephen L. Voisine
Stephen L. Voisine, Defendant

Date: 3 May 2011 /s/ Virginia Villa
Virginia G. Villa, Esq.
Attorney for Defendant

The government hereby consents to the defendant's conditional plea.

Date: 5-5-11 /s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant U.S. Attorney

The court hereby approves the defendant's conditional plea.

Date: June 13, 2011

/s/ John A. Woodcock Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2011 I mailed by United States Postal Service, the document(s) to the following defense counsel:

Virginia Villa, Esq.

THOMAS E. DELAHANTY II
United States Attorney

/s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant U.S. Attorney
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[1] UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed 03/01/12]

Criminal Action
Docket No. 1:11-cr-00017-JAW-1
Conditional Guilty Plea

UNITED STATES OF AMERICA

vs.

STEPHEN L. VOISINE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for CONDITIONAL GUILTY PLEA before the HONORABLE JOHN A. WOODCOCK, JR., Chief District Judge, in the United States District Court, Bangor, Maine, on the 13th day of June, 2011, at 10:13 a.m.

APPEARANCES:

For the Government: F. Todd Lowell, Esquire

For the Defendant: Virginia G. Villa, Esquire

Julie G. Edgecomb, RMR, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] (Defendant present with counsel in open court.)

THE COURT: All right. This is the matter of the United States versus Stephen L. Voisine, which is 11-cr-17-B-W.

Would counsel please enter their appearances.

MR. LOWELL: Todd Lowell for the government, Your Honor.

MS. VILLA: Virginia Villa for Mr. Voisine, who is present. Good morning, Your Honor.

THE COURT: Good morning. Mr. Voisine, would you state your name.

THE DEFENDANT: Stephen Voisine, Sr.

THE COURT: Mr. Voisine, the purpose of the hearing is for me to make sure that you understand what you're doing and also that you're doing what you're doing of your own free will.

THE DEFENDANT: Yes, sir.

THE COURT: In other words, what you're doing today must be both knowing and voluntary. To that end, I'm going to start by asking some questions because I want to be sure you're competent.

How old are you, Mr. Voisine?

THE DEFENDANT: 50.

THE COURT: How far did you go in school?

THE DEFENDANT: Tenth grade.

[3] THE COURT: You're taking a number of medicines. Your -- your lawyer has given me a list of medicines that you're taking. Have you taken all your prescribed medicines within the last 24 hours in their regular doses?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Do you believe that your taking these medicines has any impact on your ability to understand these matters? Do you believe the fact your having medicine -- listen to my question.

THE DEFENDANT: Yes.

THE COURT: My question is --

THE DEFENDANT: Yes.

THE COURT: What I'm interested in is whether or not you are affected by the medicine so that you can't understand me.

THE DEFENDANT: No, sir.

THE COURT: Okay. So you take these medicines all the time, right?

THE DEFENDANT: Yeah.

THE COURT: And you take them the way the doctors tell you to take them.

THE DEFENDANT: Hm-hmm.

THE COURT: Right?

THE DEFENDANT: (Nodding head up and down.)

MS. VILLA: Say yes or no.

[4] THE DEFENDANT: Yes, sir.

THE COURT: And you've gotten used to it so that it doesn't affect your mental process, right?

THE DEFENDANT: Right.

THE COURT: You can understand what goes on despite the fact you take all these medicines?

THE DEFENDANT: Yes, sir.

THE COURT: Have you failed to take any medicine that a doctor has told you you should take?

THE DEFENDANT: No, sir.

THE COURT: Mr. Voisine, have you used any drugs or alcohol in the last 24 hours other than these medicines?

THE DEFENDANT: No, sir.

THE COURT: Do you believe you understand what's happening?

THE DEFENDANT: Yes, sir.

THE COURT: Has Ms. Villa explained to you the consequences that may flow from these proceedings?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, has anything come to your attention that casts any doubt on your client's competence?

MS. VILLA: No, Your Honor.

THE COURT: The court having observed the defendant in making his answers and his demeanor and manner and attitude, and the court having observed the defendant does not [5] appear to be under the influence of medicine, drugs, or any other substance that may affect his judgment, I find the defendant is competent.

Now, Mr. Voisine, have you been provided with a copy of the proposed information setting forth the charges the government is bringing against you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the charges being made against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you consulted with Ms. Villa about these charges and has she explained them to you?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, are you satisfied your client understands the nature and significance of the charges made against him in the proposed information?

MS. VILLA: Yes, Your Honor.

THE COURT: Do you approve of the defendant's waiver of indictment in this matter?

MS. VILLA: Yes, Your Honor. I believe that we've already done that.

THE COURT: Oh.

MS. VILLA: The information was filed back in March, and he waived his right to indictment at the time of the filing, and we did it that way to allow the government to [6] avoid the process of going in front of a grand jury; But he didn't plead at that time because I had to file the motion to dismiss, which now we're --

THE COURT: Oh, okay, okay. Have you -- okay. So we'll go right to the guilty plea. Does the -- the -- I understand that your client is going to enter a conditional plea to Count 1 and plead guilty without condition to Count 2; is that right?

MS. VILLA: That is correct.

THE COURT: Your -- it seems that the issues that you brought in the motion to dismiss have been resolved by the the First Circuit in the case of *United States v. Booker*.

MS. VILLA: There is a rehearing petition pending in that case, Your Honor.

THE COURT: Okay. So I understand correctly that your client is ready for arraignment on the information?

MS. VILLA: Yes, Your Honor.

THE COURT: And I understand correctly that he intends, on arraignment, to tender a conditional plea of guilty to Count 1 and a plea of guilty to Count 2; is that correct?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Voisine, have you had an adequate opportunity to discuss the charges in both Count 1 and Count 2 with your attorney?

[7] THE DEFENDANT: Yes, sir.

THE COURT: Clerk may inquire.

THE CLERK: Stephen L. Voisine, you are charged in a two-count information bearing Criminal No. 11-17-JAW. How do you plead to Count 1 of the information, do you plead -- do you conditionally plead guilty or not guilty?

THE DEFENDANT: Conditionally guilty.

THE CLERK: And how do you plead to Count 2 of the information, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: The defendant conditionally pleads guilty to Count 1 of the information and guilty to Count 2 of the information, Your Honor.

THE COURT: Thank you.

Now, Mr. Voisine, have you conditionally pleaded guilty to Count 1 and pleaded actually guilty to Count 2 without condition of this information because you are actually guilty of those crimes subject to the conditional plea?

THE DEFENDANT: Yes, sir.

THE COURT: And, Ms. Villa, subject to the conditional plea on Count 1, are you satisfied your client has pleaded guilty because he is actually. guilty?

MS. VILLA: Yes, Your Honor.

THE COURT: Mr. Voisine, has your attorney explained to you the elements and the nature of each of the offenses [8] charged?

THE DEFENDANT: Yes, sir.

THE COURT: Has she also told you about the penalties that can be imposed?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, are you satisfied your client understands the charges contained in Counts 1 and 2 of the information and the penalties that can be imposed?

MS. VILLA: Yes, Your Honor.

THE COURT: So that it's clear for -- clear to you, Mr. Voisine, when I'm referring to Count 1 -- and I'm sure you understand this -- I'm referring to the allegation that the government has made --

THE DEFENDANT: Hm-hmm.

THE COURT: -- that on October 18, 2009, you possessed a firearm, namely, a Remington rifle, after having been convicted of a crime of domestic violence. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And when I'm referring to Count 2, I'm referring to the allegation in the information that on the same day, October 18, 2009, you shot and killed a bald eagle. Do you understand that that is the allegation in Count 2?

THE DEFENDANT: Yes, sir.

THE COURT: And it is Count 1 that you're pleading [9] conditionally guilty to. In other words, your lawyer has filed a motion to dismiss Count 1, and she is planning to raise legal issues that the court has already ruled on here on appeal to a higher court. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So you are, by entering the conditional plea of guilty, agreeing that in the event the First Circuit Court of Appeals or the United States Supreme Court, for that matter, concludes that I am correct, that for all other purposes under the law you will be found guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: On the other hand, if your lawyer is right and she successfully appeals Count 1 to the First Circuit Court of Appeals, or the United States Supreme Court, then the matter will be sent back down here to me, and I will allow, depending on what the court rules, you to withdraw your plea of guilty to Count 1. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, what you're doing today on Count 1 is all dependent upon ultimately what the appellate courts do, what the judges in the

higher courts do about the legal issue that your lawyer is raising. Do you understand that?

THE DEFENDANT: Yes, sir.

[10] THE COURT: And if it turns out that they affirm my ruling, you'll be found guilty and sentenced and that will be the end of the story. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: But if they overturn me and they find that I committed legal error, then the matter will be sent back down here, and we'll review what happens at that point based on what they tell us to do. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, turning to Count 2, it's a different story. You understand that. You understand that it's different --

THE DEFENDANT: Yes, sir.

THE COURT: -- with Count 2. You don't have, any legal issues about Count 2, which is the bald eagle count.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you're pleading guilty today period, and you're not preserving any legal issues on the bald eagle count. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So you'll proceed to sentence on that count. You understand.

THE DEFENDANT: Yes, sir.

[11] THE COURT: And you'll be sentenced, right?

THE DEFENDANT: Yes, sir.

THE COURT: And you will not be able to appeal that count -- the bald eagle count -- to a higher court on the basis of any -- on the basis -- you have not reserved the right to appeal any issues on Count 2, the bald eagle count, to a higher court. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Now, it's important for you to realize this because it's a little bit complicated -- it's not too complicated, but it's a little bit complicated -- because on one count, you've reserved the right to appeal and to challenge it and on the other you haven't. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'm going to ask you to listen carefully, then, to what I talk -- what I tell you about the penalties here because the penalties are different. Regarding the possession of the firearm count -- Mr. Voisine?

THE DEFENDANT: Hm-hmm.

THE COURT: Regarding the possession of the firearm count, you're subject to the following maximum ranges of penalties. You're subject to being placed in jail for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine.

[12] THE DEFENDANT: Hm-hmm.

THE COURT: Yes?

THE DEFENDANT: Yes, sir.

THE COURT: You can't say hm-hmm.

THE DEFENDANT: I said, yes, sir.

THE COURT: Okay.

MS. VILLA: Sir, my client has a very bad back, and I know that it is bothering him. It may be able -- or he may be able to place more concentration on these proceedings if he were allowed to sit through them.

THE COURT: All right. You can sit if you'd prefer.

THE DEFENDANT: Thank you, sir.

THE COURT: But I want you to listen to me.

Mr. Voisine?

THE DEFENDANT: Yes, sir.

THE COURT: I'm not sure I'm getting your attention. You seem to be distracted. Are you distracted today?

THE DEFENDANT: Well, not too -- too much, sir.

THE COURT: Well, I want you to listen to me.

THE DEFENDANT: (Nodding head up and down.)

THE COURT: What I'm telling you is very important for you.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, sir.

[13] THE COURT: I'm trying to tell you what your rights are, and you seem distracted, and I want you to listen carefully to me. I don't want you to start looking around and having your mind wander. This is too important.

THE DEFENDANT: Hm-hmm, yes, sir.

THE COURT: I'm going to go back. There are two different crimes here: One is the possession crime; and the other is the bald eagle crime.

THE DEFENDANT: Yes, sir.

THE COURT: Regarding the possession crime, you're subject to the following maximum penalties. You're subject to being placed in prison for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine. Following any term of imprisonment, you're subject to a period of supervised release not to exceed three years. If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years, and you're subject to a special assessment of a hundred dollars.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, turning to the bald eagle crime, this is the one that you have entered a straight plea of guilty to without any conditions. Do you understand?

[14] THE DEFENDANT: Yes, sir.

THE COURT: These are the maximum penalties. You're subject to being placed in prison for a period not to exceed one year. You're subject to a fine not to

exceed a hundred thousand dollars, and it can be both prison and a fine.

THE DEFENDANT: Yes, sir.

THE COURT: Following any term of imprisonment, you're subject to a period of supervised release not to exceed one year.

THE DEFENDANT: Yes, sir.

THE COURT: If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years.

THE DEFENDANT: Yes, sir.

MS. VILLA: I think it's one year, Your Honor, because it's a one-year maximum.

THE COURT: It doesn't sound -- it doesn't sound right that he could go back to jail for a period to exceed the amount of the maximum under the original.

MS. VILLA: I'm sorry. I didn't catch that on the -- the synopsis, but I believe it's one year.

THE COURT: Yeah, I think -- I think the synopsis misstates it as not More than two years. I think it's actually one year; is that right, Mr. Lowell?

MR. LOWELL: I'll just confirm that, Your Honor.

[15] Yes, Your Honor, that would be a year.

THE COURT: Okay. So let's go back. Count 2, bald eagle count. You're subject to being placed in prison for a period not to exceed one year. You're subject to a fine not to exceed a hundred thousand dollars. Following any term of imprisonment, you're subject to a period of supervised release not to exceed one year. If you were to violate a term of supervised release, you could go

back to jail for a period not to exceed one year. And you're subject to a special assessment of $25.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand that these are the maximum ranges of penalties that may be applicable to the crimes in Count 1 and Count 2?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, what's the -- is there any issue with the gun here?

MR. LOWELL: No, Your Honor, there's no issue with respect to a forfeiture proceeding.

THE COURT: All right.

MR. LOWELL: Thank you.

THE COURT: Now, Mr. Voisine, I want you to understand, as I suspect you do, that there is no legal requirement that you come into court today and plead guilty. Do you understand that?

[16] THE DEFENDANT: Yes, sir.

THE COURT: In other words, if you were to tell me right now that you were having second thoughts and that you wanted more time to think about this, you wanted more time to talk to your lawyer about it, you wanted more time to investigate the circumstances of the case, to review the police reports, or if you just said to me, for any reason, that you wanted more time, I would let you withdraw your guilty plea and your conditional guilty plea right now. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're going to have the right to change your mind and plead not guilty up until the

time today that I accept your guilty plea if I do decide to accept it. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I'm going to take a moment, Mr. Voisine, and tell you about the legal rights that you're waiving or giving up by pleading guilty.

You have the right to trial by jury. You have the right to the assistance of your lawyer at such a trial. If you cannot afford a lawyer, you would have the right to have a lawyer appointed for you at government expense. Do you understand?

THE DEFENDANT: Yes, sir.

[17] THE COURT: At trial, you would be presumed innocent of both charges, and the government would have the burden of proving that you are guilty beyond a reasonable doubt, and you would not have the burden of proving that you're not guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: At trial, the government's witnesses would have to come into open court and testify in front of you and your lawyer. Your lawyer would have the opportunity to cross-examine any government witness, to object to evidence the government might offer, and to offer evidence on your behalf. Your lawyer would also have the right to compel the attendance of witnesses at trial who might prove helpful to your case. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you would have the right to testify at trial if you wanted to, but you would also have the right not to testify, and you could not be

required to testify at trial. If you chose not to testify, I would instruct the jury that they could draw no inference or suggestion of guilt from the fact you did not testify. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If I accept your guilty plea, you will have given up your right to a trial and the other rights I've just described to you, and there will be no trial of any kind [18] on these charges. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea, and if all that happens, except for very limited circumstances, on Count 2, you will have no right of appeal from your conviction. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, turning to Count 1, if I proceed to enter a judgment -- Count 1 is the possession count to which you're entering a conditional plea. If I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea on Count 1 and if all that happens, except for very limited circumstances, you will have no right of appeal from that conviction, except for the issues that your lawyer has already raised to this court. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I have before me a conditional plea of guilty which has your signature above the signature line for defendant. Do you have that -- a copy of that before you or available to you?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your signature above the signature line for Stephen L. Voisine --

THE DEFENDANT: Yes, sir.

[19] THE COURT: -- defendant?

THE DEFENDANT: Yes, it is, sir.

THE COURT: Did you read this conditional plea before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to talk to Ms. Villa about the meaning of the conditional plea?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand what you were signing?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, I take it that the government consents to the defendant's conditional plea?

MR. LOWELL: Yes, it does, Your Honor.

THE COURT: Thank you.

Now, Mr. Voisine, as a part of your pleading guilty, I must find there is a factual basis for your guilty plea, and to assure myself there is such a factual basis, I'll be asking you questions about the conduct that gave rise to both of these charges, and you must answer my questions truthfully.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand?

THE DEFENDANT: Yes, sir.

[20] THE COURT: In light of all that I've just explained to you, all the rights that you have that you're waiving or giving up by entering these pleas of guilty to the charges contained in Counts 1 and 2 of the information, do you still choose to plead conditionally guilty to Count 1 and guilty to Count 2 of the information?

THE DEFENDANT: Yes, sir.

THE COURT: Now, what I'm going to do is I'm going to ask Mr. Lowell about the evidence that they would bring into this court in the event you were to go to trial, and then I'm going to turn to your lawyer and to you and ask you about that evidence and whether you agree with it or you object to it. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, I have before me a government's amended version of the offense which is dated June 8, 2011. Does this government's amended version of the offense contain, at a minimum, the evidence that the government would bring to bear if the matter were to go to trial?

MR. LOWELL: Yes, it does, Your Honor.

THE COURT: Thank you.

Ms. Villa, have you had an opportunity to review the government's amended version of the offense?

MS. VILLA: Yes, Your Honor.

[21] THE COURT: Are you satisfied the government can, in fact, produce the evidence contained in the amended version of the offense?

MS. VILLA: Yes, sir.

THE COURT: Are you also satisfied that the admissible part of that evidence would permit a properly instructed jury to determine beyond a reasonable doubt that your client is guilty of each of the crimes to which he is pleading guilty subject to the conditional plea on Count 1?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Voisine, would you stand -- you don't need to stand. Have you reviewed the government's amended version of the offense in this case?

THE DEFENDANT: Yes, sir.

THE COURT: This is the document which is dated Sep -- June 8, 2011. Do you have that before you?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Have you read it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had a chance to consult with your lawyer about it?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Now, this is -- this sets forth, [22] Mr. Voisine, exactly the evidence that the government would present in court if the matter were to go to trial. Do you understand that?

THE DEFENDANT: Yes, sir.

THE. COURT: In other words, it details specifically what it says you did wrong here. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And did you read it carefully?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what it -- what it says?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'm going to ask you a very important question, Mr. Voisine, and, obviously, in this courtroom, you must answer my question truthfully. Do you disagree with what the government says happened here in the amended version of the offense?

THE DEFENDANT: Do I disagree?

THE COURT: Yes.

THE DEFENDANT: No, sir.

THE COURT: Is the information set forth in the government's amended version of the offense true to your own personal knowledge?

THE DEFENDANT: Yes, sir.

THE COURT: Based on my review of the government's [23] amended version of the offense, the responses of your lawyer, and your own responses, I find there is a factual basis for the conditional guilty plea to the crime charged in Count 1 of the information and the guilty plea to the crime charged in Count 2 of the information.

Now, the next part of this process is for me to make sure that you're doing what you're doing of your own free will. Has anyone threatened you --

THE DEFENDANT: No, sir.

THE COURT: -- or has anyone attempted to force you to get you in any way to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: I take it there's no plea agreement here?

MR. LOWELL: That's right, Your Honor, other than the conditional plea, Your Honor.

THE COURT: Thank you.

Now, I want you to understand, Mr. Voisine, that at the time of sentencing, the law will permit you and your lawyer and the prosecutor to make recommendations to me regarding sentence, but the authority to determine the appropriate sentence does not rest with them.

THE DEFENDANT: Hm-hmm.

THE COURT: It rests with me as the judge in this court.

[24] THE DEFENDANT: Yes, sir.

THE COURT: And if I do not accept the recommendations of the parties and impose a sentence that's more severe than the one they've recommended, you will still not be allowed to withdraw your guilty pleas. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the sentencing commission guidelines will be considered by the court in determining your sentence. I have an obligation to calculate the advisory guideline sentence range, to consider increases and decreases in that range, and once I fix the range, I then consider that range as advisory-and sentence you on the basis of certain statutory factors

that are set out in federal law. Have you and your lawyer talked about how the sentencing commission guidelines may affect your sentence?

THE DEFENDANT: Yes, sir.

THE COURT: I can't determine the advisory guideline sentence until after I've read a presentence report that the probation office will prepare and until I've given your lawyer and the prosecutor an opportunity to challenge the facts in the report.

After I determine what guideline does apply to a case, I still have the authority to impose a sentence that is more severe, or it could be less severe, than the sentence called [25] for by the advisory guideline. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if I do that, if I impose a sentence that's more severe than the one called for by the applicable guideline, you will not be permitted to withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you and the government will have the right, on both Count 1 and Count 2, to appeal any sentence that I impose. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If a term of imprisonment is imposed, Mr. Voisine, you'll be required to actually serve in a jail or prison all of the imprisonment term, except for good-time deductions --

THE DEFENDANT: Hm-hmm.

THE COURT: -- and you will not be permitted to serve any part of it on parole. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promises to you in an effort to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any promise to you as to what kind of sentence I will impose?

THE DEFENDANT: No, sir.

[26] THE COURT: Has anyone made any promises to you as to what the prosecutor's recommendation at sentencing is going to be?

THE DEFENDANT: No, sir.

THE COURT: I ask you finally, then, Mr. Voisine, do you still wish to plead conditionally guilty to the charge contained in Count 1 of the information and guilty without condition to the charge, contained in Count 2 of the information?

THE DEFENDANT: Yes, sir.

THE COURT: And, Ms. Villa, do you, as Mr. Voisine's lawyer, still recommend I accept the guilty plea?

MS. VILLA: I do, Your Honor.

THE COURT: Mr. Stephen L. Voisine, since you acknowledge that you are, in fact, conditionally guilty as charged in Count 1 of the information, and since you acknowledge that you are, in fact, guilty as charged in Count 2 of the information, and since I find there is a factual basis for the pleas, and since I find, based on your responses to my questions and my direct observations, that you are competent to enter a plea, and since I find you know of your right to a trial and the rights associated with a right to a trial, and since I further find you know the maximum possible

punishments that may be imposed if you are convicted, and since I find that you have not been coerced, but that you have [27] voluntarily and knowingly tendered a plea of guilty on a conditional basis to Count 1 and a plea of straight guilty to Count 2 of this information, I now accept your guilty pleas as tendered.

I hereby order the preparation of the customary presentence investigation report.

Mr. Lowell, have you had an opportunity to review the pretrial services report in this case?

MR. LOWELL: The bail report, Your Honor?

THE COURT: Yes, pretrial services report?

MR. LOWELL: Yes, Your Honor. Mr. Voisine has been on bail, and the -- and the government has no objection to his continuing on bail.

THE COURT: All right. Ms. Villa?

MS. VILLA: We would appreciate the continuance so that he may continue to receive medical care, etc., while his sentence is pending.

THE COURT: All right. Now, you've been on bail -- I take it I must have released him on bail the last time?

MS. VILLA: Yes, Your Honor.

THE COURT: Okay. You've been on bail, Mr. Voisine, and there are certain mandatory conditions to your bail. Have you reviewed those carefully?

THE DEFENDANT: Yes, sir.

THE COURT: Have you been complying with them?

[28] THE DEFENDANT: Yes, sir.

THE COURT: Now, you understand that these are orders.

THE DEFENDANT: Hm-hmm.

THE COURT; They're court orders, right?

THE DEFENDANT: Yes, sir.

THE COURT: And you must comply with them.

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you fail to comply with them, you're going to get in more trouble than you ever would at any other time. You understand that.

THE DEFENDANT: Yes, I do, sir.

THE COURT: So you need to comply strictly with the court orders. You understand.

THE DEFENDANT: Yes, I do, sir.

THE COURT: What's going to happen next is that someone from pretrial services will come -- or from the probation department will come by, and they will meet with you, and he or she will interview you, and they'll find out more information about you --

THE DEFENDANT: Hm-hmm.

THE COURT: -- and give that information to me in a report. That information will help me better understand who you are and what you did --

THE DEFENDANT: Hm-hmm.

[29] THE COURT: -- so that I can impose a sentence that is both fair to you and just for society.

THE DEFENDANT: Yes, sir.

THE COURT: Now, once that report has been finished, it will be reduced to writing, and you'll have an opportunity to review it. I'm going to ask that you carefully review the report and make sure it's

accurate, just the way you did with the prosecution version --

THE DEFENDANT: Yes, sir.

THE COURT: -- because I am going to rely on its contents in determining the right sentence to impose upon you, and I don't want to sentence you on the basis of any inappropriate or inaccurate information. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you see anything inaccurate in that report, I'm going to ask that you let your attorney know. You understand?

THE DEFENDANT: Yes, sir,

THE COURT: Once the report has been finalized and any objections have been ruled upon, the matter will be set back here in this courtroom for the imposition of sentence. Do you understand what's going to happen next?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Is there anything further to come before the court at this time from the government?

[30] MR. LOWELL: No. Thank you, Your Honor.

THE COURT: Anything further from the defendant?

MS. VILLA: Nothing. Thank you, Your Honor.

THE COURT: The defendant is released on bail under the same terms and conditions as previously imposed.

Court stands in recess.

(Proceedings concluded at 10:47 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Julie G. Edgecomb
Julie G. Edgecomb, RMR, CRR
Official Court Reporter

March 1, 2012
Date

Not For Publication in West's Federal Reporter

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1213

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. John A. Woodcock, *U.S. District Judge*]

Before

Lynch, *Chief Judge*,
Torruella and Stahl, *Circuit Judges*.

Virginia G. Villa, Assistant Federal Public Defender, on brief for appellant.

Renée M. Bunker, Assistant United States Attorney, and *Thomas E. Delahanty II*, United States Attorney, on brief for appellee.

January 18, 2013

Per Curiam. Defendant-Appellant Stephen L. Voisine asks us to reconsider arguments heard in and decided by this court regarding: (1) whether 18 U.S.C. § 922(g)(9) should be construed to exclude a purportedly non-violent offensive physical contact misdemeanor conviction as a predicate offense; and (2) whether applying § 922(g)(9) to such a prior conviction would violate a particular defendant's Second Amendment rights. *See United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001). The Court considered and denied the exact same arguments in *United States v. Armstrong, III*, Case No. 12-1216 (1st Cir. 2012). Since there are no pertinent factual differences distinguishing the instant case from Armstrong, we accordingly incorporate its reasoning here and affirm the district court's denial of Defendant-Appellant's motion to dismiss the indictment.

So Ordered.

* * *

U.S. DISTRICT COURT
DISTRICT OF MAINE (BANGOR)

Criminal Docket For Case #: 1:11-cr-00050-JAW-1

USA

v.

ARMSTRONG

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
		* * *
04/25/2011		INDICTMENT UNSEALED as to WILLIAM E ARMSTRONG, III (mlm) (Entered: 04/25/2011)
		* * *
06/07/2011	19	MOTION to Dismiss *Indictment with Incorporated Memorandum* by WILLIAM E ARMSTRONG, III Responses due by 6/28/2011. (Attachments: # 1 Exhibit A: CR-08-432 Complaint, # 2 Exhibit B: Transcript CR-08-432)(VILLA, VIRGINIA) Modified on 6/7/2011 to add attachment descriptions (jlg). (Entered: 06/07/2011)
		* * *

DATE	NO.	DOCKET TEXT
06/23/2011	22	RESPONSE in Opposition by USA as to WILLIAM E ARMSTRONG, III re 19 MOTION to Dismiss *Indictment* Reply due by 7/7/2011. (MALONE, GAIL) (Entered: 06/23/2011)
		* * *
07/08/2011	27	ORDER denying 19 Motion to Dismiss Indictment as to WILLIAM E ARMSTRONG III (1)- The Court DENIES the Defendants Motion to Dismiss Indictment (Docket # 19). United States v. Booker, No. 09-1810, No. 09-2302, 2011 U.S. App. LEXIS 8925 (1st Cir. May 2, 2011). By JUDGE JOHN A. WOODCOCK, JR. (jlg) (Entered: 07/08/2011)
		* * *
09/08/2011	41	NOTICE OF HEARING as to WILLIAM E ARMSTRONG, III Change of Plea Hearing set for 9/26/2011 01:00 PM in Main Courtroom, Bangor before JUDGE JOHN A. WOODCOCK JR. The defendant will be required to identify every prescription medication he is taking and to specify the dosage and frequency, purpose and effects of the medication. (The same requirement applies to medications prescribed but NOT taken, with an additional requirement that the defendant explain why it was not taken and the consequences of the failure to take it.)

DATE	NO.	DOCKET TEXT
		Failure to do so satisfactorily may result in the judges refusal to accept the plea. Counsel may find it convenient to use a written list for this purpose. Counsel shall file the prosecution version and any plea agreement at least 2 business days prior to the change of plea. (jgw) (Entered: 09/08/2011)
		* * *
09/26/2011	44	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR:Change of Plea Hearing held as to WILLIAM E ARMSTRONG, III, Conditional Guilty Plea entered as to Count 1; Plea accepted on Count 1. Same bail ordered continued. (Court Reporter: Julie Edgecomb) (jgw) Modified on 9/26/2011 to include "conditional" language (jgw). (Entered: 09/26/2011)
09/26/2011	45	CONDITIONAL PLEA as to WILLIAM E ARMSTRONG, III (jgw) (Entered: 09/26/2011)
		* * *
02/14/2012	53	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR:Sentencing held on 2/14/2012 as to WILLIAM E ARMSTRONG, III. Defendant sentenced to 3 years probation, $2,500.00 fine and $100.00 special assessment. (Court Reporter:

DATE	NO.	DOCKET TEXT
		Julie Edgecomb) (jgw) (Entered: 02/15/2012)
		* * *
02/15/2012	55	JUDGMENT as to WILLIAM E ARMSTRONG, III (1), Count(s) 1, Defendant sentenced to 3 years probation, $2,500.00 fine and $100.00 special assessment. By JUDGE JOHN A. WOODCOCK, JR. (jgw) Modified on 2/15/2012 to correct fine amount (jlg). (Entered: 02/15/2012)
02/15/2012	56	NOTICE OF APPEAL re 55 JUDGMENT by WILLIAM E ARMSTRONG, III. NOTICE TO COUNSEL: A Transcript Report/ Order Form, which can be downloaded from our web site at http://www.med.uscourts.gov/operations/forms/transcript order.pdf MUST be completed and submitted to the Court of Appeals. NOTICE TO COUNSEL: Counsel should register for a First Circuit CMECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel should also review the First Circuit requirements for electronic filing by visiting the CMECF Information section at http://www.cal.uscourts.gov/efiling.htm. (VILLA, VIRGINIA) Modified on 2/15/2012 (jlg). (Entered: 02/15/2012)

DATE	NO.	DOCKET TEXT
		* * *
01/18/2013	61	OPINION of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment, Check for Receipt of Mandate on 2/19/2013. (jgw) (Entered: 01/22/2013)
01/18/2013	62	JUDGMENT of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment (jgw) (Entered: 01/22/2013)
02/21/2013	63	MANDATE of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment. (jlg) (Entered: 02/21/2013)
		* * *
01/30/2015	81	OPINION of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment, Check for Receipt of Mandate on 3/2/2015. (jgw) (Entered: 01/31/2015)
		* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed 04/13/11]

Criminal No. 11cr50-B-W

UNITED STATES OF AMERICA

v.

WILLIAM E. ARMSTRONG III

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about May 11, 2010, in the District of Maine, defendant

WILLIAM E. ARMSTRONG III

who had been convicted under the laws of the State of Maine of a misdemeanor crime of domestic violence, specifically Domestic Violence Assault, Maine Superior Court (Franklin County docket #FARSC-CR-2008-00432, dated 12-30-08), knowingly possessed in and affecting commerce the following firearms:

1. Remington .22 cal rifle, no serial number;
2. Winchester 12 gauge shotgun, serial #L2207636;
3. Mossberg .410 gauge shotgun, serial #R896740;
4. Norinco SKS 7.62 X 39 mm rifle, serial #25-010344;
5. Marlin .22 cal WMR rifle, serial #02296858;

6. Braztech Rossi Brand .20 gauge shotgun, Serial #SP787449; and
7. Ruger .22 caliber revolver, serial #492214

and the following ammunition:

1. 1162 rounds of .22 caliber ammunition;
2. 133 rounds 12 gauge ammunition;
3. 25 rounds of 20 gauge ammunition;
4. 21 rounds of .410 gauge ammunition;
5. 146 rounds of 7.62 x 39 mm ammunition;
6. 31 rounds of 7 mm ammunition;
7. 89 rounds of .357 magnum caliber ammunition;
8. 2 rounds of .38 caliber ammunition;
9. 1 round of .30-30 caliber ammunition; and
10. 153 rounds of 8 mm ammunition,

In violation of Title 18, United States Code, Section 922(g)(9).

A TRUE BILL,

[redacted]

Grand Jury Foreperson

/s/ [Illegible]
(Assistant) United States Attorney

Date: 4/13/2011

STATE OF MAINE
FRANKLIN, ss

SUPERIOR COURT
LOCATION: FARMINGTON
Docket No: CR-08-432

STATE OF MAINE

v.

WILLIAM E ARMSTRONG

COUNT 1: DOMESTIC VIOLENCE ASSAULT

DOB: [redacted]/1964

SIN: [redacted] 22

[redacted]

PO Box [redacted]

[redacted] ME 04956

G: [redacted] Ht: [redacted] Wt: [redacted] H: [redacted]

E: [redacted] R: [redacted]

COMPLAINT

The undersigned officer, being duly sworn, states upon information and belief that:

COUNT 1: 17-A M.R.S.A. §207-A(1)(A)
Seq No: 11286
DOMESTIC VIOLENCE ASSAULT
CLASS D
ATN/CTN 703784A / 002

On or about December 29, 2008, in New Vineyard, Franklin County, Maine, WILLIAM E ARMSTRONG, did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to Rosanna

Armstrong. This conduct was committed against a family or household member as defined by 19-A M.R.S.A. §4002(4).

/s/ [Illegible]
COMPLAINANT

Sworn to before me, 12-30, 2008

/s/ Vicki L. Hardy
Clerk/Justice of Peace/
Judge/Justice

OFFICER: Nathan Bean
DEPT: Franklin Sheriffs Dept
ARRAIGNMENT: December 30, 2008
JW#: 8-10782

STATE OF MAINE SUPERIOR COURT
FRANKLIN, SS. CRIMINAL ACTION
Docket No. FARSC-CR-2008-00432

STATE OF MAINE

v.

WILLIAM E. ARMSTRONG, III

(Plea & Sentencing)

BEFORE:

The Honorable Valerie Stanfill, Justice of the Superior Court, in Farmington, Maine, on Tuesday, December 30, 2008.

APPEARANCES:

James Andrews, Esq.
For the State

Linda J. Sparks, Esq.
For the Defendant

[2] (This matter came for hearing before the Honorable Valerie Stanfill, Judge of the District Court, at the Maine District Court, located in Farmington, Maine, on Tuesday, December 30, 2008.)

COURT: We have two matters here today. The first one I have is William Armstrong, and that is Superior Court Docket Number CR-08-432. And are you Mr. Armstrong?

WILLIAM E. ARMSTRONG, III, DEFENDANT: Yes, ma'am.

COURT: And were you here when the tape was played which explains the rights that you have in this matter?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand those rights?

THE DEFENDANT: Yes, ma'am.

COURT: Did you also have a chance to talk things over with Attorney Sparks?

THE DEFENDANT: A little bit.

COURT: Little bit. I understand.

LINDA J. SPARKS, ESQ.: Yes. We went over the complaint.

COURT: And are you able to waive reading?

MS. SPARKS: Yes, Your Honor.

COURT: Okay. Sir, the complaint that in front of me charges you with a domestic violence assault, Class D; specifically, it's alleged that you assaulted a Rosanna Armstrong, and she's a family or household member as defined [3] by statute. That means that if you were to be convicted of this offense, it does carry with it additional consequences, for example, under federal law and state law with regard to the possession of a firearm or ammunition. Also, if you were to be convicted of this offense, future offenses involving domestic violence could be brought as felonies. It is a Class D offense. That means there's a maximum penalty of three hundred and sixty-four days in jail, as well as a two thousand dollar fine. Do you understand the charge against you?

THE DEFENDANT: Yes, I do.

COURT: And what is your plea?

THE DEFENDANT: Guilty.

COURT: Okay. And do you understand you don't have to plead guilty today?

THE DEFENDANT: Well,--

MS. SPARKS: Yes, we have an offer.

COURT: I--I understand you have an offer. Do you understand you don't have to plead guilty today?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand that if you pled not guilty today and set--I would set the matter for trial and I would assign you an attorney--appoint you an attorney if you could not afford to hire one? Do you understand that?

THE DEFENDANT: Yes, ma'am.

COURT: And do you understand what the consequences could [4] be of this conviction under federal and state law with regard to the possession of a firearm or ammunition?

THE DEFENDANT: Yes, ma'am.

COURT: And do you understand that any future violations or charges of domestic violence could be brought as a felony if you are convicted of this offense?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand that you are therefore--if you plead guilty, you are giving up all of the rights that were outlined in--to you by Justice Mead on the videotape. Do you understand that?

THE DEFENDANT: Yes, I do.

COURT: All right. And having in mind all of that, do you still wish to plead guilty today?

THE DEFENDANT: Yes, I do.

COURT: All right. Then I'll enter that plea of guilty and make a finding of guilty. And the recommendation in this case?

JAMES ANDREWS, ESQ.: The recommendation, Your Honor, is a hundred and eighty days to the Franklin County Jail with all but forty-eight hours--strike that, twenty-four hours suspended, probation for a period of one year. Conditions of probation are to include anger management counseling, and he's to have no contact, direct or indirect, with Rosanna Armstrong unless she requests writing--requests contact in writing and [5] provides it to the probation officer.

(Indiscernible conversation)

MS. SPARKS: Yeah, except that I expected that contact was to be, like, today, so it wouldn't be a probation off--

MR. ANDREWS: That's up to--that's up to Ms. Armstrong, Rosanna--

MS. SPARKS: It would be just to the--to the Court or to the DA's office.

MR. ANDREWS: Your Honor, I--I--I think that information can be distributed--so if we want to say it to the Court, the Court which--would have it by today, I guess or we can say it-it--I mean, I think if--

COURT: Well,--

MR. ANDREWS:--the Department of Corrections gets it--

COURT:--and we're really talking two different things. I mean, either--either permission such as permitted by the probation officer, who may or may

not permit it even if it's requested by the alleged victim, or are you simply arguing that it--it be permitted? I mean,--

MS. SPARKS: My understanding--

MR. ANDREWS: It should be permitted at the victim's discretion, not the Department of Corrections discretion. So, I think it should be, but I want it in writing that she wants that contact to occur so that we all know that she has the choice.

[6] COURT: All right. And is that your understanding?

MS. SPARKS: Yeah. Our understanding is that she's gonna just write a letter that says that she wants him to come home and he'll be able to go home immediately or as soon as that comes in to somebody here at the court.

MR. ANDREWS: And that's how we expect it to work.

(Pause)

COURT: Are you gonna say something?

(Pause)

COURT: Use or possession of alcohol?

MR. ANDREWS: We're not asking for those conditions, Your Honor.

COURT: Well, it's a standard condition.

MR. ANDREWS: Is it--

COURT: The question is whether it's used excessively or not.

MR. ANDREWS: Yeah, it would be the standard condition, Your Honor.

MS. SPARKS: I don't believe there was--

MR. ANDREWS: We're not asking for it.

MS. SPARKS:--wasn't any involved.

COURT: It is a standard condition; however, no possession or use of any unlawful drugs or alcohol excessively. And I'm gonna indicate no use or possession of any firearm. What--what--what about dangerous weapons?

[7] MS. SPARKS: This was--

MR. ANDREWS: We're--we're not asking--

MS. SPARKS:--pushing.

MR. ANDREWS:--for the dangerous weapons, Your Honor. The firearms is required by federal law.

COURT: Firearms by operation of law.

MR. ANDREWS: Yeah.

COURT: I think it's actually by operation of state law, but--

UNIDENTIFIED SPEAKER: Really?

COURT: Yeah, I think so.

(Indiscernible conversation)

MR. ANDREWS: Somebody pointed out to me that there is now a three-year suspension for a license on an OUI.

COURT: OUI, second offense.

MR. ANDREWS: They didn't tell us.

COURT: They didn't tell us either. Okay. I will then impose sentence as follows, Mr. Armstrong, you are sentenced to one hundred and eighty days in the Franklin County Jail, all but twenty-four hours

suspended. You are placed on probation for a period of one year. Special conditions of probation include not to own, possess or use any firearms, to complete evaluation and can--and treatment for anger management to the satisfaction of your probation officer, to have no contact direct or indirect or enter the residence, [8] place of work, educational location of Rosanna Armstrong except with--well, I'm gonna cross that out. And then I go on to say further, "Defendant may have contact with Rosanna Armstrong if she so requests in writing to probation officer or DA."

MR. ANDREWS: Thank you, Your Honor.

COURT: There is a ten dollar victim compensation fee that is due on this. When will that be paid?

MS. SPARKS: Do you have ten dollars?

THE DEFENDANT: Tomorrow, ma'am?

COURT: Okay. Okay. You'll have some paperwork to take care of. And other than that, you're okay--you're all set. You understand if you violate any of those terms of probation, you will be made to serve some or all of the hundred and seventy-nine days that is remaining over your head? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

COURT: All right. And you're all set.

END OF HEARING

CERTIFICATION

I HEREBY CERTIFY, that the foregoing, pages 2 through 8, is a true and accurate transcript of Tape Number 3339, Index Numbers 5476 through 5990, recorded at the Maine District Court, located in Farmington, Maine, on Tuesday, December 30, 2008, of the case entitle, *State of Maine v. William E. Armstrong, III*.

Dated: May 17, 2011

/s/ Danielle Beckwith
Danielle A. Beckwith
SUPERVISOR / TRANSCRIBER

A TRUE COPY, dated at Bangor, Maine, this 17th day of May, A.D., 2011.

/s/ Danielle Beckwith
Notary

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 11-50-B-W

UNITED STATES OF AMERICA
v.
WILLIAM ARMSTRONG

CONDITIONAL PLEA
(Rule 11(a)(2))

My plea of guilty is conditional in that I reserve the right, on appeal from the judgment herein, to have an appellate court review this court's decision, dated July 8, 2011, denying my Motion to Dismiss Indictment.

Date: 9/11/2011 /s/ William Armstrong
William Armstrong, Defendant

Date: 14 Sept. /s/ Virginia Villa
Virginia Villa, Esq.
Attorney for Defendant

The government hereby consents to the defendant's conditional plea.

Date: 9-14-11 /s/ Gail Fisk Malone
Gail Fisk Malone
Assistant U.S. Attorney

The court hereby approves the defendant's conditional plea.

Date: September 26, 2011

/s/ [Illegible]
United States District Judge

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal Action
Docket No. 1:11-cr-00050-JAW-1
Conditional Guilty Plea

UNITED STATES OF AMERICA

vs.

WILLIAM E. ARMSTRONG, III,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for CONDITIONAL GUILTY PLEA before the HONORABLE JOHN A. WOODCOCK, JR., Chief District Judge, in the United States District Court, Bangor, Maine, on the 26th day of September, 2011, at 1:07 p.m.

APPEARANCES:

For the Government: Gail Fisk Malone, Esquire

For the Defendant: Virginia G. Villa, Esquire

Julie G. Edgecomb, RMR, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] (Defendant present with counsel in open court.)

THE COURT: We're here in the matter of United States versus William Armstrong, which is 11-cr-50-JAW.

Would counsel please enter their appearances.

MS. MALONE: Gail Malone, Assistant U.S. Attorney, for the government.

MS. VILLA: Virginia Villa for Mr. Armstrong, who is present. Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Armstrong, would you stand. Mr. Armstrong, the purpose of the hearing this afternoon is for me to make sure you understand what you're doing and also to make sure that you're doing what you're doing of your own free will. In other words, everything you do this afternoon must be both knowing and voluntary. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Your name is William Armstrong, III; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Armstrong, how far did you go in school?

THE DEFENDANT: Two years of college.

THE COURT: Your lawyer indicates to me that you have not been prescribed any medications; is that right?

THE DEFENDANT: That's correct, Your Honor.

[3] THE COURT: Have you recently been seeing any doctor or psychiatrist?

THE DEFENDANT: A counselor, Your Honor.

THE COURT: But you're not taking any medicine as a consequence?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you used any drugs or alcohol in the last 24 hours?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you believe you understand what's happening in these proceedings?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The court having observed the defendant in making his answers and his demeanor and manner and attitude, and the court having observed the defendant does not appear to be under the influence of medicine, drugs, or any other substance that may affect his judgment, I find the defendant is competent.

Has Ms. Villa explained to you the consequences that may flow from these proceedings?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you authorize Virginia Villa to speak on your behalf this afternoon?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I understand you wish to [4] conditionally change your plea to Count 1 of the indictment; is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Ms. Villa, do you recommend this--do you approve of this conditional change of plea and recommend I accept it?

MS. VILLA: Yes, Your Honor.

THE COURT: The clerk may proceed.

THE CLERK: William E. Armstrong, III, on April 25th, 2011, you entered a plea of not guilty to Count 1 of the indictment bearing Criminal No. 11-cr-50-JAW. How do you now plead to Count 1 of this indictment, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: The defendant pleads guilty to Count 1, Your Honor.

THE COURT: Thank you.

Now, I want to take a moment, Mr. Armstrong, and talk to you about what you're doing this afternoon. What you're doing is you're entering into a conditional plea of guilty, and I want to take a moment and explain this to you.

Your lawyer, as I'm sure you know, has challenged whether the facts in your case make it--actually make it illegal for you to possess a firearm. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

[5] THE COURT: In order to effect that challenge, what she has done is she filed a motion to dismiss the indictment. Are you aware that she filed that motion?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: Now, in the motion, she made two arguments: The first argument was that your domestic assault conviction under Maine law would not meet the definition of a domestic violence conviction under federal law. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And she also said, as a second issue, that because the Second Amendment of the Bill of Rights, which is, of course, the right to bear arms, establishes a personal right to bear arms under recent Supreme Court authority, the law under which you have been charged, namely, that you possessed a firearm after having been convicted of a misdemeanor crime of domestic violence, is unconstitutional; that's her position. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Now, do you understand that she wishes to preserve these issues and present them to the Court of Appeals?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: What happened was after she filed the motion to dismiss, I denied the motion to dismiss on both [6] grounds on July 8, 2011, and she wishes to take the question as to whether that denial was correct as a matter of law to the First Circuit Court of Appeals. Do you understand all of this?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, by entering the conditional plea of guilty, you're entering a plea conditioned on the First Circuit's ultimate decision as to whether I was correct in denying the motion to dismiss. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: That means--one way of looking at it is that you have retained the right to have my legal ruling-reviewed by a higher court. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I am right, then your conviction for the crime that is charged here, namely, possession of a firearm after conviction for a crime of domestic violence, will be final. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And, again, if I am right, you will not -- and the First Circuit Court of Appeals determines I'm correct, then you will not have the right to come back here into the court and say, oh, I'd rather revisit that question of my guilty plea that I entered into in September of 2011. Do you understand that?

[7] THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I am wrong, we will then get a decision from the appeals court and that would indicate that I'm wrong. Based on what the appeals court says, you would likely have the right to withdraw then your guilty plea. In other words, if the appeals court turned around and said that your attorney is correct, that the charge is fatally defective as a matter of law, then if the Court of Appeals remanded the matter back to this court, in effect, saying that I was wrong and that your attorney was right, then, under the law, you would generally be given the right to withdraw your guilty plea at that time. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: So if I'm right, the decision will be final, and your guilty plea and your conviction will be final, and your sentence will be final. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: But if I am wrong, then we will have the opportunity -- you will have the opportunity to revisit the matter depending on what the First Circuit Court of Appeals says. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, the other aspect I want you to clearly understand about this, Mr. Armstrong, is that your conditional plea of guilty today is limited to the two issues [8] I've just described. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: In other words, if there are other legal issues that are hiding out there in the bushes that have not been raised, you will not be able to raise them on appeal. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In other words, she has raised two legal issues only, and that's the condition upon which you're entering your guilty plea. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: So when I refer in the future, during the course of this hearing, to your entering a conditional plea of guilty, I'm talking about the discussion we've just had, in effect, that you are entering a plea of guilty, that you're admitting that you committed the crime, and that you understand you will be subject to sentencing, but that you have preserved the right to challenge the legality of the government's indictment on appeal on the two bases we've discussed. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I'm going to go back because I can't allow you to plead guilty to a crime, obviously, Mr. Armstrong, unless I determine that you have committed it and that you are actually guilty of the crime, and I'm asking [9] you all these questions subject to your right to appeal and challenge the guilty plea.

So my question for you is, have you conditionally pleaded guilty to the charge contained in Count 1 of this indictment because you are actually guilty of that crime and for no other reason?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Ms. Villa, are you satisfied that, subject to the conditional right to challenge the guilty plea, that your client has pleaded guilty because he is actually guilty?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Armstrong, have you received a copy of the indictment in this case setting--setting forth the charge?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Have you had enough time to discuss the charge with your attorney?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Has Ms. Villa explained to you the elements and the nature of the offense charged?

THE DEFENDANT: Yes, she has, Your Honor.

THE COURT: Has she also told you about the penalties that may be imposed?

THE DEFENDANT: Yes, she has, Your Honor.

[10] THE COURT: Ms. Villa, are you satisfied that your client understands the charge contained in Count 1 of the indictment and the penalties that may be imposed?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, you are charged in a one-count indictment. That indictment alleges that on or about May 11, 2010, in the District of Maine, which means the state of Maine, you, William E. Armstrong, III, who had been convicted under the laws of the state of Maine of a misdemeanor crime of domestic violence, specifically, domestic violence assault, Maine Superior Court, Franklin County, Docket No. FARSC-CR-2008-432, dated December 30, 2008, knowingly possessed in and affecting commerce the following firearms, and it lists seven separate firearms with the following ammunition, and it lists a number of different types of ammunition, all in violation of federal criminal law. Do you understand the charge set forth in the indictment?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, by pleading conditionally guilty to this crime, you're subject to the following maximum ranges of penalties. You're subject to being placed in prison for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine. Following any term of imprisonment, you're subject to being placed on supervised release for a period not to exceed three [11] years. If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years for each violation. You're subject to a special assessment of $100, and you may be subject to a forfeiture of all the firearms that the court

determines are involved in this case. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, Mr. Armstrong, I'm sure you understand this, but I want to be sure for the--clear for the record that you do. You do understand that the law does not require you to come into court today and plead guilty. Do you understand that, sir?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In effect, what that means, if you were to tell me right now that you were having second thoughts and you wanted more time to think about this case, more time to consult with your attorney, more time for whatever reason, and you told me right now that you wanted to withdraw your guilty plea, I would let you withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, you're going to have the right to withdraw your conditional plea of guilty up until the time today that I accept your conditional plea if I do decide to accept it. Do you understand?

[12] THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, Mr. Armstrong, I'm going to take a moment and review with you some of the other rights that you have that you're waiving or giving up by pleading guilty.

You have the right to trial by jury. You have the right to the assistance of your lawyer at such a trial, and if you cannot afford a lawyer, you would have the right to have a lawyer appointed for you at government expense. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: At trial, Mr. Armstrong, you would be presumed innocent, and the government would have the burden of proving that you are guilty beyond a reasonable doubt, and you would not have the burden of proving that you're not guilty. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, at trial, the government's witnesses would have to come into open court and testify in front of you and your lawyer. Your lawyer would have the opportunity to cross-examine any government witness, to object to evidence the government might offer, and to offer evidence on your behalf. Your lawyer would also have the right to compel the attendance of witnesses at trial who might prove helpful to your case. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

[13] THE COURT: Now, you would have the right to testify at trial if you wanted to, but you would also have the right not to testify, and you could not be required to testify at trial. If you chose not to testify, I would instruct the jury that they could draw no inference or suggestion of guilt from the fact you did not testify. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I accept your guilty plea, you will have given up your right to a trial and the other rights I've just described to you, and there will be no trial of any kind on this indictment. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea, and if all that happens, except for very limited circumstance--circumstances and except for the rights that I've just described to you relating to your conditional plea of guilty, you will have no additional right of appeal from your conviction. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, as a part of your pleading guilty, I must find there is a factual basis for your guilty plea, and to assure myself there is such a factual basis, I'll be asking you questions about the conduct that gave rise to this charge, and you must answer my questions truthfully, Do you [14] understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In light of all that I've just explained to you, Mr. Armstrong, all the rights that you have that you're waiving or giving up by pleading guilty, do you still choose to plead conditionally guilty to the charge contained in Count 1 of the indictment?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: You may be seated.

Ms. Malone, I have before me a prosecution version in this case which is dated September 20, 2011. Does this prosecution version contain, at a minimum, the evidence the government would bring to bear if the matter were to go to trial?

MS. MALONE: Yes, Your Honor, although defense counsel brought a minor correction to my attention before the plea, which I'd like to pass on to the court. In the last sentence of the very first paragraph, it says, the victim of the state conviction was Rosanna

Armstrong, his wife, by whom he then had one child. My math was wrong, and he had two children. Both of his children had been born by that time, so we have edited it to say, by whom he has two children.

THE COURT: He had two children, yeah. By the time of his guilty plea on December 30, 2008, he had two children.

MS, MALONE: And still does.

[15] THE COURT: Sure. Well, you wouldn't -- you wouldn't put has.

MS. MALONE: Which is --

THE COURT: You're trying to establish what he had back then, right, at the time of the -- at the time of the December 30, 2008 conviction?

MS. MALONE: Yes, Your Honor.

THE COURT: Okay.

MS. MALONE: With that amendment, this is what the government would bring to bear if the case were to go to trial.

THE COURT: Thank you very much, Ms. Malone.

Ms. Villa, have you had an opportunity to review the prosecution version as it has just been amended?

MS. VILLA: Yes, Your Honor.

THE COURT: Are you satisfied the government can, in fact, produce the evidence that's contained in the prosecution version as amended?

MS. VILLA: Yes, sir.

THE COURT: Are you also satisfied, Ms. Villa, that the admissible part of that evidence would permit a properly instructed jury to determine beyond a

reasonable doubt that your client is guilty of the crime to which he is pleading guilty subject to your conditional plea of guilty?

MS. VILLA: Yes, sir, it would.

[16] THE COURT: Now, Mr. Armstrong, would you stand again. Mr. Armstrong, you just heard the conversation I had with Ms. Malone, the prosecutor in this matter, and the issue here is a minor one, but, of course, important to your children and that is the government says in the prosecution version that it would introduce evidence that as of December 30, 2008, you were convicted of a misdemeanor domestic violence assault under Maine law. It says here that, the victim of the state conviction was Rosanna Armstrong, his wife, by whom he then had two children.

So the question, is, did you have two children by Rosanna Armstrong, your wife, as of December 30, 2008?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand that the prosecution version has been changed to reflect the fact that you had not one, but two children as of then?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, have you had an opportunity, Mr. Armstrong, to review the prosecution version in this case?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Now, you understand that this is a very important document, correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: What this document basically sets forth is the evidence that the government would bring to bear if the [17] matter were to go to trial. You understand.

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And, obviously, as I told you earlier, I can't allow you to plead guilty to a crime you didn't commit, so it's very, very important that this prosecution version be accurate and true in all its detail. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Did you review it carefully with that in mind?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: Do you understand what it is the government says happened here?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I'm going to ask you a very important question, and, obviously, Mr. Armstrong, in this courtroom, I require a truthful answer. Do you disagree with what the government says happened in the prosecution version?

THE DEFENDANT: No, I don't, Your Honor,

THE COURT: Is the information set forth in the prosecution version true to your own personal knowledge?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: Based on my review of the prosecution version as amended, your lawyer's responses, and your own responses, Mr. Armstrong, I find there is a factual basis for the conditional plea of

guilty to the crime charged in Count 1 [18] of the indictment.

Now, the next part of this process is for me to make sure that you're doing what you're doing of your own free will.

Has anyone threatened you or has anyone attempted to force you to get you in any way to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: I take it there's no plea agreement here?

MS. VILLA: Other than the conditional plea, there is not.

THE COURT: Now, I want you to understand, Mr. Armstrong, as far as sen--as far as sentencing is concerned, that the law will permit you and your lawyer and the prosecutor to make recommendations to the court regarding sentence. However, the authority to determine the appropriate sentence in this case rests with me as the judge in this court, and if I do not accept those recommendations, you will still have no right to withdraw your conditional plea of guilty. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, the sentencing commission's advisory guidelines will be considered by the court in determining your sentence. I have an obligation to calculate the applicable sentencing guideline range and to consider that range, including increases and decreases within the guidelines [19] to arrive at that range, and once I arrive at that range, I then treat the range under the guidelines as advisory and sentence you in accordance with certain factors that are set forth in federal criminal law. Have you and Ms. Villa

talked about how these issues may affect your sentence?

THE DEFENDANT: Yes, we have, Your Honor.

THE COURT: I can't determine the advisory guideline sentence until after I've read a presentence report that the probation office will prepare and until I've given your lawyer and the prosecutor an opportunity to challenge the facts in the report. After I determine what guideline applies to a case, I still have the authority to impose a sentence that is more severe, or it could be less severe, than the sentence called for by the guideline. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, if I were to impose a sentence that's more severe than the one called for by the guideline, you will still not be permitted to withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, if a term of imprisonment is imposed, you will be required to actually serve in a jail or prison all of the imprisonment term, except for good-time deductions, and you will not be permitted to serve any part of it on parole. Do you understand?

[20] THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Armstrong, has anyone made any promises to you in an effort to get you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any promise to you as to what kind of sentence I will ultimately impose?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any promises to you as to what the prosecutor's recommendation is going to be?

THE DEFENDANT: No, Your Honor.

THE COURT: I ask you finally, then, Mr. Armstrong, do you still wish to plead conditionally guilty to the charge contained in Count 1 of the indictment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Ms. Villa, as Mr. Armstrong's attorney, do you still recommend I accept the conditional plea of guilty?

MS. VILLA: Yes, Your Honor, I do.

THE COURT: Mr. William Armstrong, III, since you; acknowledge that you are, in fact, conditionally guilty as charged in Count 1 of the indictment, and since I find there is a factual basis for the plea, and since I find, based on your responses to my questions and my direct observations, that you are competent to enter a plea, and since I find you know of your right to a trial and the rights associated with a [21] right to a trial, and since I further find you know the maximum possible punishment that may be imposed if you are convicted, and since I find that you have not been coerced, but that you have voluntarily and knowingly tendered a plea of guilty on a conditional basis to Count 1 of this indictment, I now accept your conditional plea of guilty as tendered.

I hereby order the preparation of the customary presentence investigation report.

I am going to review with you the conditional plea. I have before me a written document that has a conditional plea, Rule 11(a)(2), and it states, my plea of guilty is conditional in that I reserve the right on

appeal from the judgment herein to have an appellate court review this court's decision dated July 8, 2011, denying my motion to dismiss indictment, and there is a signature above the signature line for defendant, William Armstrong. Is that your signature, sir?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: Did you read this before you signed it?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Did you have a chance to consult with

Ms. Villa before you signed it?

THE DEFENDANT: Yes, I have, Your Honor.

HE COURT: And did you understand what you were signing?

THE DEFENDANT: Yes, I do, Your Honor.

[22] THE COURT: Did you sign it voluntarily?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: In addition to accepting your guilty plea, I also have approved your conditional plea of guilty, as well.

Now, I understand that Mr. Armstrong has been released under bail conditions; is that correct?

MS. MALONE: Yes, Your Honor, and the government recommends that those conditions continue.

THE COURT: What's the defendant's position?

MS. VILLA: We would appreciate having him be able to continue on present conditions.

THE COURT: All right. I understand from probation and pretrial services that you have not

violated any of the terms and conditions of the bail that you have been on, and, therefore, given your appropriate behavior to date, Mr. Armstrong, I'm going to order that you continue to be released under the same terms and conditions.

What's going to happen next is someone from probation will come by, and he or she will meet with you, they'll interview you, and they will prepare ultimately a report called a presentence report that will contain your history and your personal characteristics and also give me an idea a little bit more as to what you did to come here today so that I can impose a sentence ultimately that is both fair to you [23] and just for society.

Now, you will have an opportunity to review that report, and, again, I'm going to ask you to avail yourself of that opportunity, to look at the report carefully and make sure its accurate because although Ms. Villa's a fine lawyer, she hasn't lived your life. So we're all going to be relying on you to make sure that the contents of the report are accurate because, Mr. Armstrong, I do not want to sentence you on the basis of any inaccurate information. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Once the report has been completed, the matter will be set back here in this courtroom for the imposition of sentence. Do you understand what's going to happen next?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Is there anything further to come before the court at this time from the government?

MS. MALONE: No, Your Honor.

THE COURT: Anything further from the defendant?

MS. VILLA: Nothing further. Thank you, Your Honor.

THE COURT: The defendant is released on bail under the same terms and conditions as previously imposed.

Court will stand in recess.

(Proceedings concluded at 1:38 p.m.)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM E. ARMSTRONG, III,

Defendant, Appellant.

Appeal from the United States District Court
for the District of Maine

[HON. JOHN A. WOODCOCK, *U.S. District Judge*]

Before

LYNCH, *Chief Judge*,
TORRUELLA and STAHL, *Circuit Judges*.

VIRGINIA G. VILLA, Assistant Federal Defender, on brief for appellant.

THOMAS E. DELAHANTY II, United States Attorney, with whom RENÉE M. BUNKER, Assistant United States Attorney, on brief for appellee.

January 18, 2013

TORRUELLA, *Circuit Judge*. Defendant-Appellant William E. Armstrong, III ("Appellant" or "Armstrong") asks us to reconsider arguments heard in and decided by this court regarding: (1) whether 18 U.S.C. § 922(g)(9) should be construed to exclude a purportedly non-violent offensive physical contact misdemeanor conviction as a predicate offense; and (2) whether applying § 922(g)(9) to such a prior conviction would violate a particular defendant's Second Amendment rights. Since Circuit precedent in *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011), and *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), forecloses the arguments made here, we affirm the district court's denial of Armstrong's motion to dismiss the indictment.

I. Factual and Procedural Background

Armstrong was charged with one count of possessing firearms and ammunition after having been convicted of a misdemeanor crime of domestic violence in contravention of 18 U.S.C. § 922(g)(9). As a predicate offense to the charge, the indictment listed a 2008 misdemeanor conviction for Armstrong's assault of his wife in violation of Maine's simple assault statute. Prior to that conviction, Armstrong had been convicted of two simple assaults: in 1992 and 2002. The 2002 and 2008 convictions were for domestic assaults against his wife, Rosanna Armstrong.

The 2008 assault was described by the district court as follows. Armstrong's wife called the police on or about December 29, 2008, after, as she described to them, she and her husband had gotten in an argument about baking cookies, and Armstrong pushed her. She pushed him back, and the situation escalated until Armstrong hit her "hard." Armstrong was charged and convicted of domestic violence assault under Maine's simple assault statute for "intentionally, knowingly or

recklessly caus[ing] bodily injury or offensive physical contact to Rosanna Armstrong."

On May 11, 2010, the Maine State Police conducted a search under warrant of the Armstrong residence for drug paraphernalia and/or marijuana possession. During this search, the police discovered six firearms and a large amount of ammunition. Since the items were not within the scope of the warrant, the police called the Bureau of Alcohol, Tobacco & Firearms ("ATF") to inform it that Armstrong was a prohibited person and had firearms in his residence. Officers also notified Armstrong that he could not have firearms in his home. Armstrong's wife then called a family friend who came and removed the firearms and brought them to his residence, where he had possession of an SKS rifle that also belonged to Armstrong at the time the original search warrant was executed.

On May 19, 2010, the ATF executed a federal warrant at the Armstrong residence, and while the officers did not find any firearms, they recovered over 1,300 rounds of various types of ammunition. The officers requested that Armstrong appear at the sheriff's office, and Armstrong explained there that he was told to remove the firearms from his home and that his wife had called his friend, who took the guns away. Armstrong then took the officers to his friend's residence, where the ATF agents observed the six firearms noted by the Maine State Police as well as the SKS rifle.

Armstrong was arrested and charged with one count of violating § 922(g)(9). In a pre-trial motion to dismiss the indictment, Armstrong challenged the indicted charge on the grounds that it did not state a federal offense and that, as applied to a conviction for a non-violent misdemeanor offense, it violated his Second

Amendment right to keep and bear arms. The district court summarily denied Armstrong's motion, and Armstrong entered a guilty plea conditioned on his right to appeal the denial of the motion to dismiss. After a plea hearing, Armstrong's plea was accepted, and he was sentenced to three years' probation, a $2,500 fine and a $100 special assessment. He timely appealed.

II. Discussion

A. Maine Assault Conviction as Proper Predicate Offense

Appellant's argument turns on an interpretation of the statutory text of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). As such, it presents a question of law that we review de novo. Booker, 644 F.3d at 17, 22.

Pursuant to 18 U.S.C. § 922(g)(9), or the Lautenberg Amendment to the Gun Control Act of 1968 ("Lautenberg Amendment"), it is unlawful "for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ... possess in or affecting commerce, any firearm or ammunition." A "misdemeanor crime of domestic violence" for purposes of § 922(g)(9) has the meaning given the term in § 921(a)(33)(A), namely, an offense that:

i. is a misdemeanor under ... State ... law; and

ii. has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of a victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by

> a person similarly situated to a spouse, parent, or guardian of the victim[.]

Armstrong's predicate offense was a misdemeanor domestic violence assault conviction under Maine statute, Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1)(A). That statute provides that "[a] person is guilty of domestic violence assault if [that person] violates section 207 and the victim is a family or household member." Section 207, in turn, provides that "[a] person is guilty of assault if [that person] intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A). The charging document in this case did not specify whether the nature of the predicate assault fell under the "bodily injury" or "offensive physical contact" prong of the Maine statute.

In *United States v. Nason*, this court was asked to examine whether "offensive physical contact" under Maine's assault statute — the very statute at issue here — must "necessarily involve[] the use or attempted use of physical force" to serve as a § 922(g)(9) predicate offense. 269 F.3d at 11. We disagreed with Nason's contention that the reference to "physical force" in the definition of a "misdemeanor crime of domestic violence" could not be reconciled with the "offensive physical contact" variant of assault in the Maine statute. Instead, we read the "plain and unambiguous meaning" of the phrase "physical force" to be "power, violence, or pressure directed against another person's body," which was broad enough to encompass the "offensive physical contact" variant of Maine's assault statute. *Id.* at 16, 20-21. Therefore, we found, § 922(g)(9) applies to the "offensive physical contact" component of the Maine simple assault statute. *Id.*

Specifically, we concluded that "Congress intended the federal law to cover all persons who have been convicted of assaulting domestic partners in circumstances similar to those delineated by both strains of the Maine statute," affirming the conviction and sentence imposed below. *Id.* at 12.

In this court's recent decision in *United States v. Booker*, we held that an offense with a mens rea of recklessness may qualify as a "misdemeanor crime of domestic violence" under § 922 (g)(9). 644 F.3d at 21. In making our decision, we reviewed the legislative history and intent behind the Lautenberg Amendment. *Id.* at 16. We noted Congress's decision to amend the gun law in recognition of "a problem of significant national concern in the combination of domestic violence and guns," and Congress's view of the "existing law as insufficiently protective of its victims." *Id.* Prior to the Amendment, federal law only prohibited firearm possession by convicted felons. *Id.* Since Congress concluded that the focus on felony convictions left guns in the hands of a large number of domestic abusers who were convicted of lesser crimes, often due to some combination of plea bargaining, outdated or ineffective laws that treated domestic violence as a lesser offense, and lack of cooperation from victims, it enacted the Amendment to "close th[e] dangerous loophole," *id.* (quoting 142 Cong. Rec. S10379 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein)) (internal quotation marks omitted), and "establish[] a policy of zero tolerance when it comes to guns and domestic violence," *id.* (alteration in original) (quoting 142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg)) (internal quotation marks omitted).

In interpreting the breadth of the definition of "misdemeanor crime of domestic violence" in § 922(g)(9), the court in *Booker* also rejected analogizing that term to 18 U.S.C. § 16's definition of "crime of violence," which includes "an offense that has as an element the use . . . of physical force against the person or property of another." *Id.* § 16(a). Specifically, this court found that, "[i]n the course of drafting § 921(a)(33)(A), Congress expressly rejected § 16's definition of 'crime of violence,' adopting a definition of 'misdemeanor crime of violence' that was, according to the sponsor of the Lautenberg Amendment, 'probably broader' than the definition of 'crime of violence' in § 16." *Booker*, 644 F.3d at 19 (quoting 142 Cong. Rec. S11872-01, S11877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)). We also explicitly stated that "[t]he threshold at which § 922(g)(9) will be triggered (misdemeanor crimes) is, accordingly, lower than the felony threshold set for the [Armed Career Criminal Act]." *Id.* at 21. "Whereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims — those in a relationship with a perpetrator of domestic violence." *Id.* Therefore, this court found "no ambiguity in the phrase 'use . . . of physical force' when read in light of the 'text, structure, history, and purpose' of § 922(g)(9)." *Id.* (citation omitted).

On the basis of these decisions, the district court summarily denied Armstrong's motion to dismiss. We cannot but agree, noting that Armstrong's counsel conceded in her motion brief below that she had raised the same claims in the district court to no avail in *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008), *United States v. Wyman*, 667 F. Supp. 2d 151 (D. Me. 2009), and *United States v. Pettengill*, 682 F.

Supp. 2d 49 (D. Me. 2010), and, further, that this court has decided *Booker* and *Wyman* adversely to her claims (*Pettingill* remains pending). However, for the sake of thoroughness, we will address the two claims raised by Appellant here.

Appellant concedes that he "engaged in offensive physical contact with his wife." However, he argues that a misdemeanor conviction for that assault cannot constitute a predicate offense for a § 922(g)(9) charge. He asserts first that the language and history of the misdemeanor violence prohibition's incorporation into § 922(g)(9) indicates that Congress never intended the proscription to apply to *non-violent* battery convictions which encompass non-violent offensive physical contact at common law. A cursory interpretation of §§ 921(a)(33)(A) and 922(g)(9), in light of *Nason* and *Booker*, clearly indicates otherwise.

Statutory interpretation begins with the statute's language. *United States v. Hartsock*, 347 F.3d 1, 5-6 (1st Cir. 2003). "Where the language of the statute is plain and the meaning unambiguous, we will do no more than enforce the statute in accordance with those plain terms." *Booker*, 644 F.3d at 17 (citing *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 50 (1st Cir. 2010)). This court is bound by the Maine Law Court's interpretation and application of state law. *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). We have already found the phrase "misdemeanor crime of domestic violence" to be unambiguous. *United States v. Meade*, 175 F.3d 215, 221 (1st Cir. 1999). In *Nason*, we reviewed the Maine Law Court's own interpretation of its simple assault statute's offensive-physical-contact prong, and found that it included "something less than bodily injury" but "more than a mere touching of another." *Nason*,

269 F.3d at 19 (quoting *State v. Pozzuoli*, 693 A.2d 745, 747 (Me. 1997)) (internal quotation marks omitted). In *Booker*, we pointed to Congress's express rejection of including as predicate offenses only such "crime[s] of violence" as are included in 18 U.S.C. § 16, and noted Congress's adoption of "a definition of 'misdemeanor crime of violence' that was, according to the sponsor of the Lautenberg Amendment, 'probably broader' than the definition of 'crime of violence' in § 16." *Booker*, 644 F.3d at 19 (quoting 142 Cong. Rec. at S11877 (statement of Sen. Lautenberg)). Courts have also found that Congress intended to encompass common-law batteries by including federal misdemeanor batteries in § 921(a)(33)'s definition of misdemeanor crimes of domestic violence. *See* 18 U.S.C. § 921(a)(33) (listing domestic-violence crimes that are "misdemeanor[s] under Federal . . . law"); *see, e.g.*, *United States v. Delis*, 558 F.3d 177, 178 (2nd Cir. 2009); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (citing *United States v. Bell*, 505 F.2d 539, 540 (7th Cir. 1974)).

Armstrong's attempt to challenge this court's precedent through the Supreme Court's ruling in *Johnson v. United States* is unavailing. *See generally Johnson*, 130 S. Ct. 1265. First, *Johnson* was issued prior to our decision in *Booker*. Second, *Johnson* explicitly avoided deciding the question at issue here. *Id.* at 1273 ("We do not decide that the phrase ['physical force'] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence [as opposed to a felony]. The issue is not before us, so we do not decide it.").

To conclude, the statute on its face, its legislative history and this court's precedent do not distinguish

between "violent" or "non-violent" misdemeanor convictions when they involve the kind of conviction at issue here, and in any case, the court fails to see how a conviction for an offensive touching such as the offensive physical contact for which Armstrong was convicted fails to constitute a predicate offense based on our prior interpretation of § 922(g)(9) predicate offense requirements of "physical force." For these reasons, we reject Appellant's first set of arguments.

Armstrong also raises a due process objection. We review this argument for plain error since Armstrong failed to raise these concerns below. *United States v. Matos*, 611 F.3d 31, 35 (1st Cir. 2010). There was no error, let alone plain error, in the district court's decision.

First, the issue that Armstrong characterizes as a "fair warning" problem is in fact a rehash of the rule of lenity argument that we squarely rejected in *Booker*. *See* 644 F.3d at 21. As we held in that case, there was no ambiguity in the phrase "use . . . of physical force" as of the time of Armstrong's conduct that led to his domestic violence conviction. *See id.* With no ambiguity, there could be no lack of warning as to the import of § 922(g). Armstrong's argument to the contrary relies on the mistaken premise that *Johnson* had any effect on the interpretation of what constitutes a "misdemeanor crime of domestic violence."

Second, Armstrong argues that he was denied due process because he did not have an opportunity to prove that the conduct underlying his domestic violence conviction was non-violent. Again, the premise of this argument fails because of its attempt to apply *Johnson* to the § 922(g) context. *Johnson* explicitly did not decide anything relating to § 922(g), much less create

a new requirement that the government must prove the degree of violence inherent in the underlying domestic misdemeanor conduct of a defendant charged under that section.

Finally, to the extent Armstrong alleges that he was denied due process because of shortcomings in Maine's procedures for adjudicating misdemeanor offenses, the argument fails. Congress explicitly addressed due process considerations with respect to misdemeanor proceedings by enacting due process protections in § 921(a)(33). These include requirements that misdemeanants have been (1) "represented by counsel in the case, or knowingly and intelligently waived their right to counsel," 18 U.S.C. § 921(a)(33)(B)(i)(I); and (2) prosecuted in jurisdictions where they were entitled to a jury trial and either received, or "knowingly and intelligently waived their right to," such a trial, *id.* § 921(a)(33)(B)(i)(II). Armstrong's convictions were full-scale convictions, he was represented by counsel, and he had additional judicial process available to challenge the factual and legal bases for his conviction by appealing to higher courts. *See, e.g., State v. Keegan*, 296 A.2d 483, 485-86 (Me. 1972) (explaining Maine's multi-tiered appeal process for misdemeanor crimes). Armstrong deliberately waived some of these state court procedures by pleading guilty, and he does not allege that his plea was not knowing or voluntary. In short, he received all of the due process protection in his misdemeanor conviction that Congress anticipated as being necessary to establish a predicate offense under § 921 (a)(33).

For all of the above-cited reasons, the court rejects Appellant's due process-based arguments.

B. Second Amendment Claim

We review constitutional challenges to federal statutes *de novo*. *Booker*, 644 F.3d at 22. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment secured an individual, and not just a collective, right to bear arms. *Id.* at 576-626. *Heller* expressly left for "future evaluation" the precise level of scrutiny to be applied to laws that allegedly infringe Second Amendment rights. *Id.* at 626, 629, 634-35.

In *Booker*, this court directly addressed the issue of whether, in light of the Supreme Court's recognition in *Heller* that an individual right to gun ownership is protected by the Second Amendment, convictions under § 922(g)(9) must be found unconstitutional. *Booker*, 644 F.3d at 22. We found the "animating interest" of § 922(g)(9) to be in "keeping guns away from people who have been proven to engage in violence with those with whom they share a domestically intimate or familial relationship, or who live with them or the like." *Id.* at 25. We also found a "substantial relationship between § 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and the governmental interest in preventing gun violence in the home" since "[s]tatistics bear out the Supreme Court's observation that 'firearms and domestic strife are a potentially deadly combination nationwide.'" *Id.* (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009)). We accordingly held that § 922(g)(9) "substantially promotes an important government interest in preventing domestic gun

violence," rejecting the appellants' Second Amendment challenge to the law. *Id.* at 26.

Armstrong attempts to distinguish this case from *Booker* by framing the Second Amendment challenge to § 922(g)(9) therein as a "facial" challenge as compared to the instant "as-applied" challenge. Specifically, he contends that, if the relevant misdemeanor conviction is not based on violent behavior, the statute cannot survive intermediate scrutiny as applied because the basis for the proscription is not tailored closely enough to the identified governmental interest to justify the deprivation of a core constitutional right.

As an initial matter, this court has not adopted intermediate scrutiny as the appropriate type of review for a challenge such as Armstrong's. *See Booker*, 644 F.3d at 25. Nonetheless, under any standard, Armstrong's claim fails.

First, Appellant has already conceded in the court below that his arguments are identical to those made in the lower court in *Booker* regarding the constitutionality of § 922(g)(9). An as-applied challenge following a failed facial challenge to the constitutionality of a statute cannot prevail if it is based on "the same type of fact situation that was envisioned by th[e] court when the facial challenge was denied." *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004); *see also Republican Nat. Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 157 (D. D.C. 2010) ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."), *aff'd*, 130 S. Ct. 3544 (2010). Therefore, since Armstrong attempts to assert an as-

applied challenge to the same kind of fact situation envisioned in *Booker*, it must fail.

Second, Appellant's arguments fail as an "as-applied" challenge because a sufficient nexus exists here between the important government interest and the disqualification of domestic violence misdemeanants like Appellant. As we found above, the statute encompasses the kind of "physical force" that Appellant was convicted of using under the Maine domestic violence assault statute. Further, in targeting such misdemeanants for its proscriptions, Congress stated clear reasons for effectuating the governmental interest through its broadening of the scope of the firearm proscription so as to provide more substantial protections for victims of domestic violence. Specifically, the Lautenberg Amendment was enacted because Congress found the focus on felony convictions too narrow. *Booker*, 644 F.3d at 16. By broadening the proscription to misdemeanants like Appellant, Congress sought to "alleviate the danger of intimate homicide by convicted abusers." *Id.* at 26. Research that we described in *Booker* linking the presence of a gun in the home of a convicted domestic abuser with increased risk of homicide applies equally here to justify the restraint on Appellant's constitutional rights. We therefore reject Armstrong's challenge to the constitutionality of applying § 922(g)(9) to him.

III. Conclusion

For the foregoing reasons, we **affirm** the district court.

No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Title 18 of the United States Code § 922(g)(9) prohibits a person who has previously been convicted of a "misdemeanor crime of domestic violence" from engaging in certain actions, including possessing a firearm that has traveled in interstate commerce. 18 U.S.C. § 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as one that "(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" persons who share specified relationships.

The question presented is:

Does a misdemeanor crime with the *mens rea* of recklessness qualify as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 778 F.3d 176 and is reproduced in the Joint Appendix (J.A.) at J.A. 6–90. The First Circuit's order denying rehearing en banc is unreported, and it is reproduced at J.A. 91–92. The First Circuit's earlier opinion in petitioner Armstrong's case is reported at 706 F.3d 1 and reproduced at J.A. 186–99. The First Circuit's earlier opinion in petitioner Voisine's case is unpublished and reported at 495 F. App'x 102. J.A. 145–146. The First Circuit's prior orders denying rehearing en banc are unreported. This Court's order vacating the First Circuit's earlier opinion is reported at 134 S. Ct. 1759 (2014). The opinions of the United States District Court for the District of Maine are unreported.

JURISDICTION

The Court of Appeals issued its decision after remand from this Court on January 30, 2015. J.A. 6. A timely petition for rehearing and rehearing en banc was denied on March 30, 2015. The petition for certiorari was timely filed and granted on October 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a–7a.

STATEMENT OF THE CASE

This case presents a narrow question of statutory interpretation: Whether the "use or attempted use of

physical force" under 18 U.S.C. § 921(a)(33)(A) extends to merely reckless (as opposed to intentional) offensive physical contact. Under the Gun Control Act, those who have a prior misdemeanor conviction involving the "use or attempted use of physical force" against a domestic relation become prohibited persons who cannot possess a firearm and who are subject to a felony charge with a maximum of 10 years imprisonment if they do. See 18 U.S.C. § 922(g)(9). Petitioners' prior misdemeanor convictions came under a state statute that prohibits reckless as well as intentional conduct and, under the categorical approach, those convictions must be assumed to be for reckless offensive physical contact.

Canons of statutory construction and prior decisions from this Court dictate that "use . . . of physical force" requires intentional or knowing conduct. Last Term, in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), the Court held that this same statutory provision must be construed in accordance with the common-law definition of battery. That holding resolves the instant case as well: At common law, mere recklessness was not sufficient to support a criminal battery charge. Thus, petitioners' prior misdemeanor convictions do not fall within § 921(a)(33)(A).

Here, the First Circuit reached a contrary conclusion only by eschewing the common-law meaning of the statutory language in contravention of *Castleman*. Instead, the First Circuit favored its own unique assessment of the "context" of § 922(g)(9) and the policy considerations it perceived as underlying the statute. That reasoning, however, leapt over the well-established analytical steps the Court has adopted precisely to avoid subjective

assessments of policy in interpreting complex statutory language.

District Court Proceedings Involving Petitioner Voisine

In 2004, petitioner Stephen L. Voisine pleaded guilty in Maine state court to a misdemeanor simple assault conviction pursuant to Me. Stat. tit. 17-A, § 207(1)(A).[1] See App. at 5a. Under § 207(1)(A), a person is guilty of assault if he or she "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." The charging document alleged the crime in generic terms, stating that he "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to another person. The state court plea colloquy, which comprises one transcript page, reflects that Mr. Voisine entered his plea pursuant to a negotiated settlement that would result in him paying a $200 fine.

In 2009, Mr. Voisine came to the attention of federal authorities through an anonymous tip that he had shot a bald eagle. During the federal investigation, Mr. Voisine turned a rifle over to authorities. Federal authorities examined Mr. Voisine's criminal history and noticed his 2004 conviction. In 2011, the United States charged Mr. Voisine in a two-count federal information. Pertinent here, Count 1 charged unlawful possession of a firearm by a prohibited person in violation of 18

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[1] Maine is one of several states in which the crime of assault "is defined to include what is usually classified as a battery." Wayne R. LaFave, 1 Substantive Criminal Law § 16.1 n.2 (2d ed. 2003).

U.S.C. § 922(g)(9), predicated on the 2004 state conviction.

Mr. Voisine moved to dismiss Count 1 on the same grounds asserted here: namely, that a prior charge presumptively predicated on reckless conduct was insufficient to render him a prohibited person under § 921(a)(33)(A)'s "use . . . of physical force" language. He attached to his motion the generic charging document and plea colloquy from his 2004 simple assault conviction. See J.A. 98.

The federal district court denied the motion to dismiss. Thereafter, Mr. Voisine pleaded guilty to both counts, but reserved the right to appeal the denial of the motion to dismiss. The district court sentenced him to imprisonment of a year and a day.

District Court Proceedings Involving Petitioner Armstrong

In 2008, petitioner William E. Armstrong pleaded guilty in Maine state court to a misdemeanor domestic violence assault in violation of Me. Stat. tit. 17-A, § 207-A(1)(A), which, like the statute at issue in Mr. Voisine's case, permits conviction for reckless conduct. The charging document tracked the language of the simple assault statute, alleging that Mr. Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to" a family or household member. The plea colloquy transcript reflects that Mr. Armstrong's guilty plea was in response to an offer from the state to recommend a time-served sentence, one year of probation, and a $10 fine. Mr. Armstrong returned home after pleading guilty.

In May 2010, during an unrelated investigation, Maine State Police obtained a search warrant for Mr.

Armstrong's residence. While executing the warrant, state officers noticed firearms and ammunition in the residence. Because the state warrant did not allow the seizure of weapons, the state officers reported the presence of the firearms and ammunition to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). After receiving the state report, ATF agents learned of Mr. Armstrong's 2008 misdemeanor assault conviction and obtained and executed a federal search warrant on Mr. Armstrong's residence. Federal officers recovered ammunition and, later, with Mr. Armstrong's help, discovered firearms belonging to him at the residence of a family friend. Federal prosecutors filed a one-count indictment charging Mr. Armstrong with a violation of 18 U.S.C. § 922(g)(9), predicated on his 2008 state assault conviction.

Like Mr. Voisine, Mr. Armstrong moved to dismiss the federal charge, raising the same argument asserted here, and attached the underlying charging document and transcript of his state court plea colloquy. The district court denied the motion, citing the First Circuit's then-recent decision in *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011). *Booker* considered the same Maine simple assault statute at issue here, holding that a prior misdemeanor conviction premised on reckless conduct is sufficient to constitute the "use . . . of physical force" for purposes of defining a "crime of domestic violence" in § 922(g)(9). *Id.* at 13–14.

Mr. Armstrong pleaded guilty to the § 922(g)(9) charge, conditioned upon his right to appeal the denial of his motion to dismiss. The district court sentenced him to three years probation and levied a $2,500 fine.

The Initial First Circuit Decision

The First Circuit affirmed in both appeals based upon its *Booker* precedent. See J.A. 145–146, 186–199. Mr. Voisine and Mr. Armstrong filed a joint petition for a writ of certiorari to this Court.

This Court's *Castleman* Decision And Order Remanding Petitioners' Cases To The First Circuit

In *Castleman*, the Court considered the *actus reus* necessary to constitute a "use . . . of physical force" for purposes of 18 U.S.C. § 921(a)(33)(A). The Court held that Congress had intended that phrase to reflect the type of conduct needed to support a common-law charge of battery—that is, conduct causing bodily injury or offensive physical contact. Thus, relying on the common-law definition of battery, the Court held that § 921(a)(33)(A)'s *actus reus* element extended to the causation of offensive physical contact. *Castleman*, 134 S. Ct. at 1410–13.

Castleman further noted that the Court previously had "reserved the question whether a reckless application of force could constitute a 'use' of force," but that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient." *Id.* at 1414 n.8. The Court observed that the First Circuit stood alone on the other side of the question, holding that recklessness was sufficient. See *id.* (citing *Booker*, 644 F.3d at 19–20).

Thereafter, this Court granted petitioners' joint petition for a writ of certiorari, vacated the First Circuit's decision, and remanded petitioners' cases to the First Circuit for further consideration in light of *Castleman*. *Armstrong* v. *United States*, 134 S. Ct. 1759 (2014).

The First Circuit Decision On Remand

The First Circuit recognized on remand that *Castleman* had adopted the common-law definition of battery in holding that the phrase "use of physical force" in § 921(a)(33)(A) could be satisfied by offensive touching.[2] But it nevertheless declined to apply the common-law meaning when analyzing whether a *mens rea* of recklessness could establish a "use of physical force" under § 921(a)(33)(A). It also rejected the cases *Castleman* noted as holding that the reckless application of force was not a "use of physical force" as required to establish a crime of violence (discussing *Castleman's* recognition that the First Circuit was an outlier on this issue), on the ground that those cases interpreted the phrase "use of physical force" in different statutory definitions and different contexts. J.A. 12–16. It deemed Maine's definition of "recklessness" to include "an element of intentionality and specificity" sufficient to bring reckless assault within the scope of offenses constituting a "misdemeanor crime of domestic violence" under § 922(g)(9) and found no distinction between recklessly causing physical

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[2] *Castleman* addressed a Tennessee conviction for knowingly and intentionally causing bodily injury. *Castleman*, 134 S. Ct. at 1413. The Court recognized that in addition to proscribing intentionally, knowingly, or recklessly causing bodily injury to another, the statute also proscribed intentionally or knowingly causing another to fear imminent bodily injury, and intentionally or knowingly causing offensive physical contact. *Id.* While the Court noted that not every type of assault must involve the use of physical force, the Court found it unnecessary to decide whether a domestic assault conviction in Tennessee was categorically a misdemeanor crime of domestic violence, because the parties did not contest that the statute was divisible and application of the modified categorical approach established the use of physical force. *Id.* at 1414.

injury and recklessly causing offensive physical contact. *Id.* at 21–23.

Applying the categorical approach, the dissent focused on reckless causation of offensive physical contact, the least culpable combination of *actus reus* and *mens rea* constituting an offense under the Maine assault statute, and concluded that such a crime did not involve the requisite use of physical force. *Id.* at 39–46, 88–90 (Torruella, J., dissenting). The dissent argued that Maine's definition of recklessness did not connote the substantial amount of deliberateness and intent found by the majority. *Id.* at 65–68. The dissent further noted that § 921(a)(33)(A) had nearly identical language to that of statutes held by ten other circuit courts to require a *mens rea* greater than recklessness, and concluded that § 921(a)(33)(A)'s "use . . . of physical force" requirement can be satisfied by offensive touching only if that touching is intentional rather than merely reckless. *Id.* at 86–90.

SUMMARY OF ARGUMENT

The Maine statute under which petitioners were convicted proscribes "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." Under *Castleman*, if petitioners had been convicted of knowingly or intentionally causing either bodily injury or offensive physical contact, their state convictions would be federal § 922(g)(9) predicates. *Castleman*, however, did not expressly decide whether *reckless* misdemeanors fit within the scope of § 922(g)(9).

Because petitioners' charging documents make it impossible to tell which variant of assault (*i.e.*, which combination of *mens rea* and *actus reus*) they pleaded

guilty to under the Maine statute, the Court must apply the categorical approach set forth in *Taylor* v. *United States*, 495 U.S. 575, 600–02 (1990). Under that approach, the Court must assume that they were convicted of the statutory violation least likely to qualify as a § 922(g)(9) predicate offense. Thus, unless the Court determines that reckless offensive touching qualifies as a "use . . . of physical force," it must overturn petitioners' convictions.

Castleman held that the *actus reus* of causing offensive physical touching fit within the definition of a "misdemeanor crime of domestic violence" in § 922(g)(9). In reaching that result, the Court concluded that Congress had intended to adopt the definition of "force" used in the common-law crime of battery; therefore, any offensive physical contact would be sufficient to satisfy the "use . . . of physical force" requirement of § 921(a)(33)(A).

Castleman's holding necessitates that reckless misdemeanors cannot constitute § 922(g)(9) predicate convictions. By adopting the common-law battery definition of "use . . . of physical force," Congress adopted the cluster of elements that compose that definition. Offensive-contact battery (that is, battery that does not cause bodily injury) at common-law required not only the *actus reus* of offensive contact, but also the *mens rea* of intent. Thus, one could not commit common-law battery through offensive touching with *any* state of mind, but only through *intentional* offensive touching.

Construing "use . . . of physical force" to reach only the knowing or intentional use of force not only comports with the common-law definition of an offensive-contact battery, but also with the plain meaning of the phrase as this Court has interpreted

it. In *Smith* v. *United States*, 508 U.S. 223, 229 (1993), the Court considered the dictionary meaning of the verb "to use," determining that it meant to actively implement or employ something to obtain an objective. Subsequently, in *Bailey* v. *United States*, 516 U.S. 137, 143 (1995), the Court reaffirmed that definition, holding that "use" of a firearm, as contained in 18 U.S.C. § 924(c), meant the "active employment" of the firearm to obtain an objective; possession, alone, did not constitute "use." And in *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) the Court found the "active employment" definition determinative in construing the term "use . . . of physical force" in 18 U.S.C. § 16(a). *Leocal* added that "use . . . of physical force" "suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* Since *Leocal*, almost all federal courts of appeals have held that crimes involving reckless conduct do not meet the definition of "use . . . of physical force," as reckless conduct is accidental conduct.

The First Circuit is the only court of appeals to hold to the contrary, and it did so largely on the basis of an incomplete account of the policy concerns at issue. To be sure, domestic violence is a real and serious problem in our society, and it deserves to be treated as such. The First Circuit wrongly assumed, however, that a misdemeanor domestic violence conviction results from the most egregious cases because officers and prosecutors exercise discretion. This rationale fails to account for "mandatory"- or "preferred arrest" laws and departmental policies requiring a police officer to make an arrest in some or all domestic disputes, as well as "no-drop" prosecution policies. Such removal of law enforcement and prosecutorial discretion inevitably

leads to higher conviction rates in the misdemeanor court system, which in most states provides misdemeanants few meaningful due process rights.

Section 921(a)(33)(A) unambiguously excludes reckless conduct from its coverage, but to the extent that there are any doubts at all they should be resolved in favor of petitioners' preferred reading in light of the doctrines of lenity and constitutional avoidance.

ARGUMENT

I. THE PHRASE "USE . . . OF PHYSICAL FORCE" EXCLUDES MERELY RECKLESS CONDUCT.

Petitioners' convictions under § 922(g)(9) were based on their guilty pleas to the misdemeanor offense of "intentionally, knowingly, or recklessly caus[ing] bodily injury or offensive physical contact to another person" under Maine state law. Me. Stat. tit. 17-A, §§ 207(1)(A) & 207-A(1)(A). Combining the three possible mental states and the two possible criminal acts under the Maine assault statute yields six possible ways by which one can commit an assault in Maine—one can intentionally, knowingly, or recklessly cause either bodily injury or offensive physical contact.

In light of petitioners' generic charging documents, it was (and is) impossible to determine which of the six possible types of Maine assault was the basis for petitioners' state convictions. As a result, the First Circuit correctly recognized that it needed to analyze whether a Maine domestic violence assault qualified as a § 922(g)(9) predicate offense using the "categorical approach." J.A. 10–14. Under that approach, a court analyzing such a question must "look[] only to the statutory definitions of the prior

offenses, and not to the particular facts underlying those convictions."[3] *Taylor*, 495 U.S. at 600, see also *Shepard* v. *United States*, 544 U.S. 13 (2005). Thus, unless the Court determines that a conviction under the Maine domestic violence assault statute categorically constitutes a "misdemeanor crime of domestic violence,"—that is, unless all possible mental states and all possible acts of assault delineated by Maine law qualify—petitioners' convictions must be overturned. See *Castleman*, 134 S. Ct. at 1413–14.

It is clear under *Castleman* that four of the six possible variants of assault under the Maine statute at issue qualify as "misdemeanor crimes of domestic violence." But *Castleman* expressly left open the question of whether *reckless* batteries, which are within the scope of the Maine statute, qualify as "misdemeanor crimes of domestic violence" for purposes of § 922(g)(9). *Id.* at 1414 n.8.

***18 U.S.C. § 922(g)(9) Predicate Offenses After* Castleman**

	Intentionally	Knowingly	Recklessly
Cause bodily injury	Qualifies	Qualifies	?
Cause offensive physical contact	Qualifies	Qualifies	?

[3] The categorical approach rests on a constitutional foundation. Going beyond the elements of the statute at issue and "allowing a sentencing court to make a disputed determination about what a defendant and a state judge must have understood as the factual basis of a prior plea" would "at the least[] raise serious Sixth Amendment concerns." *Descamps* v. *United States*, 133 S. Ct. 2276, 2288 (2013) (citation omitted).

The issue in this case is reflected in the boxes at the right hand side of the table: Whether the phrase "use . . . of physical force," as contained in 18 U.S.C. § 921(a)(33)(A) extends to all misdemeanor Maine assaults that are committed with the *mens rea* of recklessness. In Maine, a person acts recklessly if he or she "consciously disregards a risk" that his or her conduct will cause a certain result, and the disregard constitutes a "gross deviation" from the standard of conduct of a reasonable person. Me. Stat. tit. 17-A § 35(3).[4] By contrast, a person acts "knowingly" under Maine law only when he or she is "aware that it is practically certain" that his or her conduct will cause a result. *Id.* § 35(2).

A. *Castleman* Dictates That The Common-Law Definition Of Battery Must Be Used To Interpret The Phrase "use . . . of physical force" In 18 U.S.C. § 921(a)(33)(A).

In *Castleman*, this Court relied on the common-law definition of battery to determine the meaning of the phrase "use . . . of physical force" in the same statutory provision at issue in this case, holding that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" 134 S. Ct. at 1410. In doing so, the Court drew a connection between "use . . . of physical force" and the crime of battery at common-

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[4] This is similar to the Model Penal Code definition of the term. *See* Model Penal Code § 2.02(2)(c) ("A person acts recklessly . . when he consciously disregards a substantial and unjustifiable risk . The risk must be of such a nature and degree that . . its disregard involves a gross deviation" from a reasonable standard of care.)

law, noting that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction" because domestic violence crimes are usually prosecuted under general assault or battery statutes, the origins of which are rooted in common-law assault and battery crimes. *Id.* at 1411.

The Court distinguished a prior case that reached the opposite conclusion when interpreting the phrase "use . . . of physical force" in a different statute. In *Johnson* v. *United States*, 559 U.S. 133 (2010), the issue was the *actus reus* required for "use . . . of physical force" in the context of defining "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B)(i), part of the Armed Career Criminal Act. The Court in *Johnson* declined to rely on the common-law definition of battery, explaining that it made little sense to believe that Congress intended the common-law definition of "force"—that is, the "slightest offensive touching"—to govern in the context of "violent felon[ies]." *Johnson*, 559 U.S. at 139–40. By contrast, in *Castleman*, the Court concluded that "the common-law meaning of 'force' fit[] perfectly," given that the Court was interpreting that term in the context of "misdemeanor crime[s] of domestic violence" rather than "violent felon[ies]," especially considering that battery was a misdemeanor, not a felony, at common-law. 134 S. Ct. at 1410.

Contrary to the First Circuit's tortured efforts to distinguish *Castleman*,[5] Congress's use of the phrase

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[5] Although both petitioners and the government "agree[d] that, under *Castleman*, the term 'use of physical force' . . incorporates the common law *mens rea* for battery", the First Circuit majority "decline[d] the parties' invitation to define the *mens rea* of a common law battery independent of the

"use . . . of physical force" must be interpreted to incorporate not only common-law battery's *actus reus* (as the Court held in *Castleman*), but also its *mens rea*. This result is mandated by the "settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (citation omitted); see also *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

B. The Common-Law Definition Of Battery Makes Clear That The Crime Could Be Committed Only With The Mental State Of Intentional Or Knowing Conduct.

In *Johnson*, the Court recognized that a common-law battery was "the *intentional* application of unlawful force against the person of another." *Johnson*, 599 U.S. at 139 (emphasis added) (citing 2 Wayne LaFave & Austin Scott, Substantive Criminal Law § 7.15(a), 301 (1986 and Supp. 2003)). This description of common-law battery rests on firm ground. Blackstone described battery as "[t]he least

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interpretation Maine gives its own statute." J.A. 19. The First Circuit's reasoning, as discussed herein, was fatally flawed because it failed to follow *Castleman*'s reasoning and because it was based on invalid policy determinations.

touching of another's person willfully, or in anger."[6] 3 William Blackstone, *Commentaries on the Laws of England*, 120 (1768). A criminal battery, according to Black's Law Dictionary, is "[t]he nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact." *Battery*, Black's Law Dictionary (10th ed. 2014); see also *Battery*, Ballentine's Law Dictionary (3d ed. 1969) (defining battery as the "unlawful touching or striking of the person of another . . . with the intention of bringing about a harmful or offensive contact . . .").

The *Johnson* formulation also accords with judicial opinions from an array of states applying the common-law of battery. See, *e.g.*, *Lynch* v. *Virginia*, 109 S.E. 427, 428 (Va. 1921) ("To constitute battery, there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but *upon the intent of the actor*." (emphasis added)); *Cluff* v. *Mut. Benefit Life Ins. Co.*, 95 Mass. 308, 317 (Mass. 1866) ("An assault is an intentional attempt by force to injure the person of another. A battery is committed whenever the menaced violence of an assault is done in the least degree to the person." (citation omitted)); *Razor* v. *Kinsey*, 55 Ill. App. 605, 613–14 (Ill. App. Ct. 1894) ("By the common law as well as by our statutory definition, an assault and battery is a successful

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[6] Blackstone's use of the disjunctive "or" between "willfully" and "in anger" does not indicate that a criminal act done in anger was not intentional. Instead, it indicates only a lack of *malice*, which was signified by the adverb "willfully." *See Willful*, Black's Law Dictionary (10th ed. 2014) ("The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*.").

attempt to commit violence to the person, and necessarily intentional.").

Thus, the common-law misdemeanor of battery required a *mens rea* greater than recklessness. The only occasional exception to that requirement at common-law occurred in cases where wanton or reckless conduct had caused actual, physical harm. See, *e.g.*, *Massachusetts* v. *Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (noting that the mental state necessary to constitute assault and battery was the "intentional doing of an act which, by reason of its wanton or grossly negligent character, exposes another to personal injury, *and causes such an injury*." (emphasis added)). That exception is inapplicable here because the categorical approach requires treatment of petitioners' convictions as if they were for recklessly causing offensive physical contact. Moreover, *Castleman* affirmatively adopted the level of force associated only with intentional conduct.

C. A Plain Language Reading Of The Statute Confirms That "use . . . of physical force" Excludes Reckless Conduct.

The Court's prior cases interpreting the plain meaning of the verb "use" and the phrase "use . . . of physical force" further confirm that they require intentional and purposeful conduct—and thus do not extend to merely reckless conduct.

The foundation of the Court's decisions interpreting the phrase "use . . . of physical force" are its cases defining the term "use" in the criminal code. In *Smith*, 508 U.S. at 225, the statute at issue prohibited the "use" of a firearm in relation to other enumerated crimes, which included a drug trafficking offense. See 18 U.S.C. § 924(c). The defendant, who

was charged with a violation of this statute based on his attempt to trade a firearm for drugs, argued that this act did not constitute "use" of a firearm, because he had not used the firearm as a weapon, but rather as an item of barter. Because the statute did not define the meaning of the word "use," the Court began its statutory interpretation with the plain language of the statute, explaining:

> Webster's [Dictionary] defines "to use" as "to convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990).

Smith, 508 U.S. at 228–29 (holding that defendant's conduct in bartering a firearm for drugs constituted "use" of the firearm). The Court adopted this same approach when it later determined that "use" cannot be equated with mere possession of a firearm, without some other factor that indicates that the firearm was *actively* employed to carry out the defendant's purpose of furthering a predicate crime. See *Bailey*, 516 U.S. at 143.

The Court relied on these cases in interpreting the *mens rea* required to constitute "use . . . of physical force" under another provision of the federal criminal code. *Leocal* involved a provision of the Immigration and Nationality Act that makes an alien who has committed a "crime of violence," as defined in 18 U.S.C. § 16, deportable from the United States. Section 16 in turn defines a "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Leocal, 543 U.S. at 4–5.

The question presented in *Leocal* was whether the crime of driving under the influence and causing serious bodily injury under Florida state law—which did not contain any *mens rea* element and could be committed negligently—constituted a "crime of violence" pursuant to 18 U.S.C. § 16.

The Court considered the term "use" to be "critical," stating:

> As we said in a similar context in *Bailey*, "use" requires active employment. 516 U.S.[] at 145. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. . . . The key phrase in § 16(a)—the "use . . . of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

Leocal, 543 U.S. at 9 (citation omitted).

The Court thus held that "use . . . of physical force," in § 16(a) cannot encompass conduct committed with

the *mens rea* of negligence. The Court then went a step further, holding that § 16(b), the broader provision of the statute that extends to an offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," similarly does not encompass conduct committed with the *mens rea* of negligence. As the Court explained, "while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another." *Id.* at 11.

Notably, the language of § 16(a) at issue in *Leocal* is nearly identical to the language of § 921(a)(33)(A) at issue in this case, as both require the "use . . . of physical force." Absent compelling evidence to the contrary, the same statutory language should be given the same meaning. See, *e.g.*, *Leocal*, 543 U.S. at 11 ("[W]hile § 16(b) is broader than § 16(a) . . . , it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person . . . of another. Accordingly, we must give the language in § 16(b) an identical construction"); *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

The Court in *Leocal* did not expressly reach the issue in this case—whether a crime committed with the *mens rea* of recklessness constitutes a "use . . . of physical force" for purposes of the criminal code. See *Castleman*, 134 S. Ct. at 1414 n.8 (noting that "*Leocal*

reserved the question whether a reckless application of force could constitute a 'use' of force."). Nevertheless, the Court in *Leocal* repeatedly emphasized that "use . . . of physical force" cannot be "accidental." *Leocal*, 543 U.S. at 9, 11.

Unsurprisingly—given that the result of reckless conduct is, as a matter of ordinary meaning, accidental—"the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute a "use . . . of physical force" for purposes of federal criminal law. See *Castleman*, 134 S. Ct. at 1414 n.8.[7] For example, the Ninth Circuit, in *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), held that a recklessly committed domestic violence assault did not qualify as a § 16 crime of violence, given *Leocal*'s instruction that "accidental" conduct was not sufficient.[8] See *Fernandez-Ruiz*, U.S. 466 F.3d at 1129–30. Even the First Circuit has held, in interpreting another federal criminal statute that "use . . . of physical force" cannot extend to reckless conduct. See *United States*

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[7] This phrase appears in several other provisions of the federal criminal code, including 18 U.S.C. §§ 373 (Solicitation to Commit a Crime of Violence), 16 (Crime of Violence Defined), 521 (Criminal Street Gangs), 921(a)(33)(A) (defining "misdemeanor crime of domestic violence"), 924(e) (defining "Violent Felony" for sentencing enhancement purpose), 1512 (Witness Tampering), 3156 (Bail Reform Act definitions), and 5032 (Transfer of a Juvenile for Criminal Prosecution). The phrase also occurs at various points in the Federal Sentencing Guidelines. *See, e.g.*, 2L1.2 (Immigration Application Note B(iii)), 4B1.2 (Career Offender Definitions).

[8] The definition of recklessness in that case was similar to the Maine definition at issue in this case. *See Fernandez-Ruiz*, 466 F.3d at 1130.

v. *Fish*, 758 F.3d 1, 9–10 (1st Cir. 2014) (interpreting 18 U.S.C. § 16(b)). Thus, both the plain meaning of "use . . . of physical force" and the common-law definition of battery dictate that a predicate crime must be committed with a *mens rea* of more than recklessness to qualify as a "misdemeanor crime of domestic violence."

II. NEITHER LEGISLATIVE HISTORY NOR POLICY CONSIDERATIONS WARRANT DEPARTING FROM BINDING PRECEDENT AND THE TEXT OF THE STATUTE.

A. A Sparse Legislative History Cannot Override Clear Statutory Language.

Where, as here, the meaning of the statutory text is clear, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). Assuming *arguendo* that legislative history were relevant to this case—as the First Circuit believed—it too indicates that a reckless act does not constitute a "use . . . of physical force." Nothing in the threadbare legislative history of § 922(g)(9), referred to as the "Lautenberg Amendment" after the Senator who sponsored it, can override the *mens rea* requirement reflected in a fair reading of the statute's text. The Lautenberg Amendment was not the subject of extensive congressional discussions, hearings, and reports that would give any insight into whether the "use . . . of physical force" may be satisfied by the mere reckless causing of an offensive contact. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 483 (1951) ("[T]he legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will."). To the

contrary, the Lautenberg Amendment was a last-minute addition to a 750-page omnibus spending bill.

Although Senator Lautenberg and a few others spoke on the Senate floor in favor of the bill, such stray remarks in support of a last-minute rider to an act whose primary purpose was to make "omnibus consolidated appropriations for the fiscal year ending September 30, 1997"[9] are not entitled to substantial weight. This is particularly true where, as here, the statute does not criminalize petitioners' conduct on a fair reading of its text, and where principles of lenity would favor petitioners in any event. See *Crandon* v. *United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."); *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (emphasizing "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant," in declining to rely on legislative history).

As originally introduced, the Lautenberg Amendment defined a "crime involving domestic violence" as a "*crime of violence* . . . committed by a current or former spouse, parent, or guardian of the victim . . . ." Statement of Sen. Lautenberg, 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (introducing amendment) (emphasis added). "Crime of violence" is in turn defined under 18 U.S.C. § 16 to include not only an offense involving the "use . . . of physical force," *id.* § 16(a), but also an offense that involves the "threatened use of physical force" against

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[9] Pub. L. No. 104-208, 110 Stat. 3009, 3009 (Sept. 30, 1996).

a person or property, *id.*, or one that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.* at § 16(b).

"[C]rime of violence" with its broader definition, did not make it into the final version, however. The specific concern reported by Senator Lautenberg leading to the change involved the application of the gun ban to perpetrators of property crimes. Statement of Sen. Lautenberg, 142 Cong. Rec. S11876, S11877 (daily ed. Sept. 30, 1996). Thus, as the sponsor himself explained, the final version included "a new definition of the crimes for which the gun ban will be imposed" precisely because some had "argued that the term crime of violence was too broad" in the language as originally proposed. *Id.*

Finally, it is worth noting that the specific goal of the Lautenberg Amendment was to close a "loophole" where crimes that would be treated as a felony if the victim were a stranger could end up resulting in misdemeanor convictions because "[o]utdated or ineffective laws often treat domestic violence as a lesser offense." Statement of Sen. Feinstein, 142 Cong. Rec. S10380 (daily ed. Sept. 12, 1996). In other words, Congress sought to put crimes of domestic violence on equal footing by "look[ing] to the type of crime, rather than the classification of the conviction." *Id.*; see also Statement of Sen. Wellstone, 142 Cong. Rec. S10379 (daily ed. Sept. 12, 1996) ("If the offense is a misdemeanor, then under the current law there is a huge loophole."). But if the purpose was to close a loophole where serious crimes—such as those involving intentional harm—are charged as misdemeanors, it does not make sense to extend the statute's reach to conduct that is inherently *less* serious, *i.e.*, merely recklessly causing

offensive contact. The best reading of the statute, which does not reach reckless conduct, is also the one that best fits the "loophole" that Congress appears to have had in mind.

To be sure, the legislative history includes a string of general, impassioned statements of policy regarding the very serious problem of domestic violence. But those general statements of policy do not speak to the precise and technical question of *mens rea* at issue here. Nor do they trump either the specific evidence of express congressional purpose supporting petitioners' proposed reading or the principles of lenity that would compel reversal if the statute were ambiguous. See *Hughey*, 495 U.S. at 422 (emphasizing lenity and refusing to resolve "ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history"). Nothing in the legislative history casts doubt on the proposition that the mere reckless causing of an offensive contact does not constitute the "use of physical force" under 18 U.S.C. § 921(a)(33)(A).

B. Recent Data Undermines The First Circuit's Policy Rationale.

The First Circuit majority relied in large part on this Court's recognition in *Castleman* that domestic violence often escalates in severity over time and that as a result, minor acts may be part of a pattern of domestic violence over time. J.A. 7–8. To be sure, domestic violence is a serious problem, and it often involves an ongoing cycle of behavior between intimate partners or family members that may escalate. Legislative and law enforcement responses have recognized and should recognize it as such. But the Court of Appeals went too far in its reliance on

policy to justify a broad application of § 922(g)(9) to cover reckless conduct across the board despite canons of construction requiring a more narrow reading.

In its policy rationale, the First Circuit majority incorrectly assumed that Maine likely would not prosecute minor reckless acts, and that there was little reason to think that § 922(g)(9) would be applied to such minor acts. J.A. 24 (noting that "it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate."). As an initial matter, no appeal to the discretion of police and prosecutors can justify an overbroad reading of a criminal statute. Cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory . . . . Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

More critically, however, the empirical assumption on which the First Circuit's appeal to police and prosecutorial discretion is based turns out to be false. The reality is that law enforcement officers frequently lack discretion and must make an arrest when called about a domestic dispute, even when the dispute involves minor incidents or the facts are unclear. Many states, including Maine, now have

either mandatory or preferred arrest laws requiring or encouraging responding officers to arrest under some or all circumstances in a domestic dispute. See, *e.g.*, David Hirschel, U.S. Dep't. of Justice, Nat'l Inst. of Justice, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, (July 25, 2008) (discussing mandatory arrest as a response to domestic violence and identifying states in which the practice is law). And even in states where arrest is preferred or left to the discretion of the officer, police departments often have internal policies of mandatory arrest in domestic disputes. *Id.* at 10.

States have also directly limited prosecutorial discretion by adopting "no-drop" policies in cases stemming from domestic disputes. See Erica L. Smith, et al., *State Court Processing of Domestic Violence Cases*, U.S. Dept. of Justice, Bureau of Justice Statistics, (March 12, 2008) (discussing case processing, including prosecution practices in domestic dispute assault cases compared to those in cases involving non-domestic dispute assault). As a result, more people involved in intimate partner domestic disputes are arrested, prosecuted, and convicted, because police and prosecutors do not have the discretion to forego arrest and prosecution in cases where the conduct is minor or unclear. See David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. Crim. L. & Criminology 255, 258–59 (Fall 2007) (discussing the impact of mandatory arrest, including an increase in the number of women arrested); Smith, et al., *supra*, at 2–3 (concluding that domestic assaults now have a higher overall conviction rate, felony conviction rate, and misdemeanor conviction rate compared to non-domestic assaults, and that as a result of "no-drop"

prosecution policies, prosecutorial diversion, whereby a defendant is given an opportunity to avoid prosecution and conviction for a first time offense or minor conduct, has been reduced). It stands to reason that the practices of mandatory arrest, dual arrest, and aggressive prosecution result in higher rates of minor conduct being swept into the criminal justice system, precisely the opposite effect the Court of Appeals relied on in determining that, as a matter of public policy, there is relatively little harm in the broadest possible reading of § 922(g)(9).[10]

The First Circuit majority's policy rationale is unjustified (and unjust) for the additional reason that, once swept into the misdemeanor court system, a defendant is vulnerable to pleading guilty to reckless conduct regardless of that person's guilt or innocence. See, *e.g.*, Robert C. Boruchowitz, et al., Nat'l Ass'n of Criminal Def. Lawyers *Minor Crimes,*

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[10] Some studies show that mandatory arrest laws may have a serious adverse impact on women, especially as a result of law enforcement practices of "dual arrests," in which both parties to a domestic dispute are arrested. "Anecdotal evidence from some battered women advocates suggests that 'dual arrests' are the most serious problem with mandatory arrest." *See, e.g.*, Radha Iyengar, *Does the certainty of arrest reduce domestic violence? Evidence from mandatory and recommended arrest laws*, 93 Journal of Public Economics, 85, 88 (2009) (analyzing the impact of mandatory arrest on domestic violence, and in particular, on intimate partner homicides). This is especially concerning because the available data suggest that the notion that domestic disputes are repeated and necessarily evolve into ongoing violence, and that arrest as an intervention is a meaningful deterrent, is inconclusive. *See, e.g.*, Christopher D. Maxwell, et al., U.S. Dep't. of Justice, Nat'l Inst. of Justice, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program*, (July 2001) (analyzing recidivism in domestic violence cases).

Massive Waste, The Terrible Roll of America's Misdemeanor Courts, (April 2009) (detailing the due process concerns and abuses in the misdemeanor court system, including the overwhelming case loads, the pressure on defendants from judges and prosecutors to take pleas to resolve cases quickly, and the frequency with which defendants plead guilty without counsel).[11] Wrongful convictions happen as a result of the dire consequences that face defendants, including incarceration from conviction and the fear of not being able to make bail while awaiting trial (and being absent from a job as a result). See, *e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 101, 134–35 (2012) ("The confluence of police authority to trigger incarceration simply by asserting that a minor offense has been committed, combined with the pressures of bail and general acquiescence of the poor [and minorities], can create the perfect storm of wrongful pleas."). See also, *Amici* Br. ACLU et. al., at 6–7, *Kingsley* v. *Hendrickson et. al.*, No. 14-

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[11] This study documented widespread constitutional abuses in the state misdemeanor court systems. It found that of the more than 10 million misdemeanor cases arising annually, most were resolved at the first court appearance in a matter of minutes with the defendant agreeing to plead guilty, more often than not without having had any meaningful representation from a defense attorney. *Id.* at 11–12. Following the publication of this study, the American Civil Liberties Union prevailed in a class action on behalf of misdemeanants in two cities in Washington state, in which the court found there was a lack of meaningful representation because public defenders had excessively high case loads. *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d, 1122 (W.D. Wash. 2013). See also *Pattershall* v. *Jenness*, 485 A.2d 980, 983 (Me. 1984) (citation omitted) (misdemeanor conviction for misdemeanor assault in which fine or punishment is minimal does not present "the incentive and opportunity to fully and fairly litigate the issues in the criminal proceedings" to act as preclusive in subsequent civil action for same assault).

6368 (S. Ct. Mar. 9, 2015) (describing a study of non-felony defendants in New York City in 2008 showing that those who could not make bail (the vast majority) spent an average of 15.7 days in jail). Some data suggest the risk of wrongful convictions is high for the most vulnerable groups, non-whites, and the poor. Boruchowitz, et al., *supra*, at 47–48 (discussing the disproportionate impact the injustices of the misdemeanor system have on the poor and minorities).

Accordingly, the First Circuit's premature resort to policy concerns cannot stand even on its own terms. Well-established procedural and constitutional shortcomings in the state misdemeanor court systems counsel against reading § 922(g)(9) to cast the broadest possible net and raise serious concerns that there is no safety mechanism in the criminal justice system's handling of domestic violence cases to ensure a defendant is not wrongfully or unfairly deprived of a constitutional right. Indeed, such a reading of the statute may do more harm than good from a policy perspective.[12]

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[12] Policy considerations may even dictate the opposite conclusion—that categorically sweeping reckless conduct into the definition of "use of physical force" in the face of mandatory arrest practices may so negatively impact the most disenfranchised groups that it *increases* rather than decreases the likelihood of future domestic violence. *See, e.g.*, Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 Duke J. Gender L. & Pol'y, 221 (2012–13); Iyengar, *supra* at 93; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 24 Hous. L. Rev., 237 (2005–06); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, Signs: 25 Journal of Women in Culture and Society, 1133 (2000).

III. THE RULE OF LENITY REQUIRES THAT THE "USE . . . OF PHYSICAL FORCE" BE READ TO EXCLUDE RECKLESS CONDUCT.

In light of the foregoing, § 922(g)(9) should be read to require a *mens rea* of intent or knowledge, consistent with common-law and plain-language meanings of the phrase "use . . . of physical force." Reliance upon a lesser mental state on the basis of sparse legislative history or subjective contextual analyses only serves to introduce ambiguity into an otherwise clear statutory mandate. Yet, if ambiguity is generated in this fashion, the doctrine of lenity requires a court to choose the meaning that excludes reckless conduct from the phrase "use . . . of physical force" as it occurs in § 921(a)(33)(A).

Lenity should be invoked when a criminal statute is so ambiguous "that the Court must simply guess as to what Congress intended," *Castleman*, 134 S. Ct. at 1416 (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)). The First Circuit's effort to create a foggy relationship between Maine's "recklessness" *mens rea* and the mental state of "misdemeanor crime[s] of domestic violence" under § 922(g)(9) necessitates such a guessing game, with significant sentences for petitioners and future defendants hanging in the balance.

The rule of lenity is especially applicable where, as here, a court's guess at Congress's intent means the difference between a potentially heavy sentence—up to ten years in prison, 18 U.S.C. § 924(a)(2)—and *no* criminal liability whatsoever. "[I]t is appropriate, before [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Cleveland* v.

United States, 531 U.S. 12, 25 (2000) (quoting *United States* v. *Universal C.I.T. Credit Co.*, 344 U.S. 218, 222 (1952); see also *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (invoking the rule of lenity when a statutory term's definition meant the difference between up to 20 years in prison and no liability). No such clear and definite language exists in § 922(g)(9) or § 921(a)(33)(A) to suggest that recklessness is sufficient to render a past crime a "misdemeanor crime of domestic violence" and indeed, the only clear and definite textual evidence (*viz.* the word "use") points in exactly the opposite direction. It is wholly inappropriate, therefore, for petitioners to "languish[] in prison" without "the lawmaker ha[ving] clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

IV. THE DOCTRINE OF CONSTITUTIONAL DOUBT ALSO REQUIRES THAT THE "USE . . . OF PHYSICAL FORCE" EXCLUDES RECKLESS CONDUCT.

Before the Court accepts an argument that "use . . . of physical force" within the meaning of § 921 (a)(33)(A), can include reckless conduct crimes, it must consider whether petitioners can lose their constitutional rights by accident and on the basis of having caused only minor harms or no harm at all. Although many states have felony level reckless conduct offenses, the Court is not construing a felony provision. Indeed, the very reason that *Castleman* adopted the common-law definition of "force" was that simple assaults and batteries involve lesser harms than felonies and are inherently associated with misdemeanor level conduct. See *Castleman* at 1410-11. See also *Boyde* v. *California*, 494 U.S. 370,

399 n.5 (1990) (Marshall, J., dissenting) ("in describing the evolution of offense classification in our criminal system, [a criminal treatise] reports that 'serious offenses' such as murder, manslaughter, rape and arson came to be called felonies, whereas other, presumably 'less serious' offenses, came to be called misdemeanors." (citing 1 Charles E. Torcia, Wharton's Criminal Law § 17, 81 (14th ed. 1978))).

To the extent that Congress intended to prohibit those who "use" such minor acts to control a domestic partner, see *Castleman*, 134 S. Ct. at 1411–12, "use" inherently connotes intentionality. But the First Circuit disassociated Congress's purpose from its goal and would disqualify individuals from any gun possession for life even where their prior convictions are deemed crimes of recklessness. Such crimes fall outside the scope of Congress's apparent purpose, and the subsequent felony conduct of possession comes entirely within the scope of constitutionally protected conduct.

Under the doctrine of constitutional doubt, if there are two reasonable ways to construe a statute, and one would raise constitutional questions while the other would not, the Court must opt for the construction that avoids the constitutional question. See *Zadvydas* v. *Davis*, 533 U.S. 678, 688–90 (2001) (setting forth a two-step approach to the constitutional doubt doctrine: (1) determine whether the statute is ambiguous; and (2) if so, adopt the interpretation free from grave constitutional concerns.); see also *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (citing *United States ex rel. Att'y Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)) (emphasis added) (in order to invoke the doctrine of constitutional doubt, no finding of unconstitutionality is required; instead, the standard

is that a "grave and doubtful constitutional question[] *arises*.") (emphasis added).

Here, reading § 922(g)(9) to prohibit any individual convicted of *recklessly* causing offensive physical contact to be precluded from exercising his or her right to possess a firearm would raise grave constitutional issues. In passing § 922(g)(9), Congress sought to protect domestic partners from violent crime by disarming those who have been convicted of prior domestic violence assaults. But a lifetime ban on firearm possession based on reckless conduct presents an insufficient connection between the target concern, protecting victims of domestic violence, and the remedy, disarming perpetrators of "domestic violence." See *Castleman*, 134 S. Ct. at 1411–12.

Put another way, extending § 922(g)(9) to unintentional but reckless conduct weakens the nexus between the prohibited conduct and the law's objectives. Although the Court has not established which level of scrutiny should apply to Second Amendment issues, it has ruled out rational basis. See *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008). The other tests that may be applied to a Second Amendment analysis range from strict scrutiny, to intermediate scrutiny, to an "undue burden" analysis. Strict scrutiny requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest in order to survive" a constitutional challenge. See *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997). "Intermediate scrutiny" requires that the challenged statute or regulation be "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). A statute or regulation survives an "undue burden" analysis where it does not have the "purpose or effect

[of] plac[ing] a substantial obstacle in the path" of the individual seeking to engage in constitutionally protected conduct. *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007).

Post-*Heller*, the circuit courts have disagreed on the level of constitutional scrutiny to apply to Second Amendment cases. Even in those cases in which the courts have applied intermediate scrutiny to analyses of § 922(g)(9), however, the cases partially turn on the presumed intentionally violent nature of the convicted. See *United States* v. *Chester*, 628 F.3d 673, 690 (4th Cir. 2010) (Davis, J., concurring in the judgment) ("Undisputedly, those convicted for having committed *violent* assaults against cohabitants and family members in general, and [the defendant] in particular, are not law-abiding, responsible citizens. [The defendant] had been convicted of a serious crime . . . in which the facts indicate that he acted *particularly violently*.") (emphasis added); *United States* v. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (defining § 922(g)(9) violations to exclude "risky act[s]").

This Court has deliberately avoided deciding whether constitutionally-protected conduct can be criminalized based on recklessness. See, *e.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015) (finding negligent conduct insufficient to establish the offense of communicating a threat by means of interstate commerce, but declining to reach the question as to whether reckless conduct would suffice); *United States* v. *Bailey*, 444 U.S. 394, 407 (1980) (declining to decide whether mental state of recklessness or negligence could suffice for criminal liability under 18 U.S.C. § 751, even though a "court may someday confront a case" presenting issue); *Ginsberg* v. *New York*, 390 U.S. 629, 644–45 (1968) (finding that

rejecting defendant's challenge to obscenity law "makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution'"); *Smith* v. *California*, 361 U.S. 147, 154 (1959) (overturning conviction because the lower court did not require any mental element under the statute, but noting that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution"); cf. *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 103–04 (1981) (finding a lower court's order impermissible under the First Amendment but not deciding "what standards are mandated by the First Amendment in this kind of case . . ."). Given the clear language used by Congress here, the Court should not tread haphazardly into the thicket it has so far declined to enter.

The First Circuit majority's reading of § 922(g)(9) makes the law over-inclusive by including unintentional crimes. The uncertainty of both the post-*Heller* constitutional gun-control landscape, as well as potential problems of predicating a federal gun prohibition felony based upon misdemeanor convictions for reckless conduct, creates grave constitutional questions that the Court would have to answer if it were to extend the statute to defendants such as the petitioners.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit, vacate petitioners' convictions, and remand these cases for proceedings consistent with the exclusion of reckless conduct misdemeanors from the definition of a "misdemeanor crime of domestic violence."

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

18 U.S.C. § 922(g)(9)

(g) It shall be unlawful for any person— . . .

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(33)(A)

(a)(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 924(c)

(c) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such

crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years . . . .

18 U.S.C. § 16

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or prop-erty of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(e)(2)(B)(i)

(e)(2)(B) [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

18 U.S.C. § 373

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corrobora-

tive of that intent, solicits . . . such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both . . . .

18 U.S.C. § 521

(c) OFFENSES.—The offenses described in this section are— . . .

(2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another . . . .

18 U.S.C. § 924(e)

(e)(2)(B) [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

18 U.S.C. § 1512

(3) The punishment for an offense under this subsection is— . . .

(B) in the case of— . . .

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years . . . .

18 U.S.C. § 3156

(a)(4) [T]he term "crime of violence" means—

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another . . . .

18 U.S.C. § 5032

(A) juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another . . . and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

MAINE STATUTES

Me. Stat. tit. 17-A, § 207(1)(A)

(1) A person is guilty of assault if:

(A) The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person . . . .

Me. Stat. tit. 17-A, § 207-A(1)(A)

(1) A person is guilty of domestic violence assault if:

(A) The person violates section 207 and the victim is a family or household member . . . .

Me. Stat. tit. 17-A, § 35(3)(A)

A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result.

Me. Stat. tit. 17-A, § 35(2)

(A) A person acts knowingly with respect to a result of the person's conduct when the person is aware that it is practically certain that the person's conduct will cause such a result.

(B) A person acts knowingly with respect to attendant circumstances when the person is aware that such circumstances exist.

OTHER RELATED SOURCES

Model Penal Code § 2.02(2)(c)

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

U.S. Sentencing Guidelines § 2L1.2

Application Note (B)(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: [listing several specific offenses], or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

U.S. Sentencing Guidelines § 4B1.2

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

No. 14-10154

In the Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). The question presented is:

Whether petitioners' Maine convictions for misdemeanor domestic assault by recklessly causing bodily injury or offensive physical contact qualify as "misdemeanor crime[s] of domestic violence" under Sections 922(g)(9) and 921(a)(33)(A).

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In the Supreme Court of the United States

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STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 6-90) is reported at 778 F.3d 176. A prior opinion of the court of appeals in petitioner Armstrong's case is reported at 706 F.3d 1. A prior opinion of the court of appeals in petitioner Voisine's case is not published in the Federal Reporter but is reprinted at 495 Fed. Appx. 101.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2015. A petition for rehearing was denied on March 31, 2015 (J.A. 91-92). The petition for a writ of certiorari was filed on June 4, 2015. The petition was granted on October 30, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief.

STATEMENT

Following conditional guilty pleas in the United States District Court for the District of Maine, each petitioner was convicted of possessing firearms or ammunition, or both, after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Petitioner Voisine was also convicted of killing a bald eagle, in violation of 16 U.S.C. 668(a). Petitioner Armstrong was sentenced to three years of probation. Petitioner Voisine was sentenced to one year and one day of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed petitioners' convictions in separate opinions. 706 F.3d 1; 495 Fed. Appx. 101 (per curiam). This Court granted their joint petition for a writ of certiorari, vacated the judgments, and remanded to the court of appeals for further consideration in light of *United States* v. *Castleman*, 134 S. Ct. 1405 (2014). See 134 S. Ct. 1759 (2014). On remand, the court of appeals consolidated the cases and once again affirmed. J.A. 6-28.

1. a. Under federal firearms laws, it is unlawful for certain persons, including any person who has been convicted of a felony in any court, to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C 922(g); see *United States* v. *Hayes*, 555 U.S. 415, 418 (2009). In 1996, Congress passed the "Lautenberg Amendment" to Section 922(g), which expanded the firearms prohibition to include any person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9);

see Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, Tit. I, § 101(f) [§ 658(b)(2)], 110 Stat. 2009-372. Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(i) and (ii); see *Hayes*, 555 U.S. at 420-421. A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

b. Maine's assault statute provides that "[a] person is guilty of assault if" he "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006) (Section 207). Section 207 thus "specif[ies] two independent types of simple assault, one where bodily injury results and another where there is merely an offensive physical contact without resulting bodily injury." *State* v. *Carmichael*, 405 A.2d 732, 735 (Me. 1979). Maine also has a specific provision addressing domestic assault, which punishes any person who "violates Section 207" if "the victim is a family or household member." Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1)(A) (Supp. 2015) (Section 207-A). See J.A. 9.

The Maine Supreme Judicial Court has defined "offensive physical contact" to require intentional contact that a reasonable person would find offensive. See *State* v. *Pozzuoli*, 693 A.2d 745, 747 (1997) (upholding jury instructions defining offensive physical conduct under Section 207 "as knowingly intending bodily

contact or unlawful touching done in such a manner as would reasonably be expected to violate the person or dignity of the victim"); *State* v. *Rembert*, 658 A.2d 656, 658 (1995) (defining offensive physical contact as "[u]npermitted and *intentional* contacts with anything so connected with the body as to be customarily regarded as part of the other's person" (quoting Restatement (Second) of Torts § 18 cmt. c (1965)) (emphasis added)). Under Maine law, the offensiveness of the contact is determined by asking whether "a reasonable person would find [the contact] offensive" and requires "something less than bodily injury * * * but * * * more than a mere touching of another." See *Pozzuoli*, 693 A.2d at 747. A defendant who intentionally makes contact with the victim may be liable for being reckless about doing so in an offensive manner. See *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (holding that evidence supported a lesser-included assault instruction based on defendant's claim that he "did recklessly touch the victim [in her genital area] and the touching was offensive, but it was not [the defendant's] purpose to engage in offensive or sexual contact" because his intent was to touch the victim's shoulder or her hip to wake her); see also *United States* v. *Nason*, 269 F.3d 10, 19 (1st Cir. 2001) (analyzing Maine's offensive physical contact offense).

The Maine Criminal Code provides that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result," Me. Rev. Stat. Ann. tit. 17–A, § 35(3)(A) (Supp. 2015); or "recklessly with respect to attendant circumstances when the person consciously disregards a risk that such circumstances exist," *id.* § 35(3)(B). "[T]he dis-

regard of the risk * * * must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

2. a. In 2008, petitioner Armstrong was convicted of assaulting his wife. J.A. 9-10. Armstrong was charged in Maine state court with misdemeanor domestic violence assault, in violation of Section 207-A. See J.A. 9. The state charging document alleged that Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to his wife. J.A. 154-155. Armstrong pleaded guilty to that offense and was sentenced to 180 days of imprisonment, with all but 24 hours suspended, and one year of probation. J.A. 157-159, 161-162.

In May 2010, Maine police officers found six firearms and ammunition at Armstrong's home during a search for drug paraphernalia and marijuana. J.A. 9. Armstrong was charged with one count of possessing firearms and ammunition by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). J.A. 152-153.

b. In June 2003, petitioner Voisine was charged in Maine state court with simple assault, in violation of Section 207(1)(A). See J.A. 98. The state charging document alleged that Voisine "did intentionally knowingly or recklessly cause bodily injury or offensive physical contact to" his girlfriend and that "[t]he crime involved domestic violence." *Ibid.* Voisine pleaded guilty to the charged offense and was ordered to pay a $200 fine. J.A. 96. Voisine was again convicted of a Maine misdemeanor assault of his girlfriend in 2005. J.A. 10.

In 2009, officers arrested Voisine on the federal misdemeanor charge of killing a bald eagle, in violation of 16 U.S.C. 668(a). Voisine turned a rifle over to police in the course of that investigation. J.A. 10. After conducting a background check, however, officers discovered Voisine's prior misdemeanor assault charge. *Ibid.* In March 2011, the government filed an information charging Voisine with one count of possessing a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), as well as with killing a bald eagle, in violation of 16 U.S.C. 668(a). J.A. 10, 93-94.

c. Each petitioner moved to dismiss his indictment, arguing that the Maine assault and domestic assault statutes did not constitute Section 922(g)(9) predicates because (1) those provisions may be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve *violent* "physical force." J.A. 10-11. The district court denied the motions, J.A. 10, and each petitioner thereafter entered a conditional guilty plea reserving the right to appeal the denial of his motion to dismiss, J.A. 116, 164.

3. On appeal, petitioners renewed their argument that their convictions under Maine's simple assault statute, Section 207, or Maine's domestic assault statute, Section 207-A, do not categorically qualify as a misdemeanor crimes of domestic violence for purposes of Section 922(g)(9). The court of appeals affirmed petitioners' convictions in separate opinions.

a. The court of appeals affirmed Armstrong's conviction in a published decision. 706 F.3d at 1-8. The court explained that its prior decisions in *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011), cert.

denied, 132 S. Ct. 1538 (2012), and *Nason*, 269 F.3d 10, established "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)," and that the phrase "physical force" was "broad enough to encompass the 'offensive physical contact' variant of Maine's assault statute." 706 F.3d at 4 (quoting *Booker*, 644 F.3d at 21, and citing *Nason*, 269 F.3d at 16, 20-21). Accordingly, the court affirmed Armstrong's conviction.

b. The court of appeals affirmed Voisine's Section 922(g)(9) conviction in an unpublished, per curiam decision. 495 Fed. Appx. at 101-102. Finding "no pertinent factual differences distinguishing the instant case from *Armstrong*," the court "incorporate[d] its reasoning." *Id.* at 102.

4. On May 6, 2013, Armstrong and Voisine filed a joint petition for a writ of certiorari in this Court. While that petition was pending, this Court decided *Castleman* and held that the "physical force" element of Section 921(a)(33)(A) may be satisfied with a degree of force supporting common-law battery, including offensive touching. 134 S. Ct. at 1410. In March 2014, this Court granted certiorari, vacated the judgments in both petitioners' cases, and remanded to the court of appeals "for further consideration in light of * * * *Castleman*." 134 S. Ct. at 1759.

5. On remand, a divided panel of the court of appeals again affirmed petitioners' convictions. J.A. 6-28.

a. The court of appeals concluded that reckless domestic assault under Section 207 and 207-A constitutes a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). J.A. 12-26.

The court of appeals focused on the "unique nature of [Section] 922(g)(9)." J.A. 7; see J.A. 13, 18. Section 922(g)(9), the court observed, is aimed at "domestic violence"—"a term of art that encompasses a range of force broader than that which constitutes 'violence' simpliciter, including acts that might not constitute 'violence' in a nondomestic context." J.A. 13, 15 (quoting *Castleman*, 134 S. Ct. at 1411 & n.4) (internal quotation marks omitted).

Section 922(g)(9)'s drafting history, the court of appeals stated, confirmed that the statute is "broader" than the definition of "crime of violence" under 18 U.S.C. 16. J.A. 16 (quoting *Booker*, 644 F.3d at 19). Unlike Section 16's definition of "crime of violence," which is incorporated into a broad range of statutory contexts, the court of appeals observed that "[Section] 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms." J.A. 19 (citing *Castleman*, 134 S. Ct. at 1408-1412); see J.A. 14-19.

Considering the recognition in *Castleman* and *Hayes* that "perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" the court of appeals concluded that "Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes," which "encompass[] assault statutes for those states that allow conviction with a mens rea of recklessness."[1] J.A. 19 (citation

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[1] Given Section 922(g)(9)'s distinctive statutory context, the court of appeals distinguished other courts of appeals' decisions, cited in a footnote in *Castleman*, which had interpreted the phrase "use * * * of physical force" to exclude reckless conduct for

omitted). The court of appeals further explained that this "broader reading of [Section] 922(g)(9)'s mens rea requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault." J.A. 20.

Turning to Maine law, the court of appeals emphasized that "Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent," inasmuch as "[t]he statutory definition requires that a person '*consciously* disregard[] a risk that the person's conduct will cause' the result." J.A. 20 (quoting Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(A) (Supp. 2015)). Because of the "volitional component" of the offense, the court concluded that "[r]eckless assaults in Maine" categorically constitute "misdemeanor crime[s] of domestic violence" under Section 922(g)(9). J.A. 22.

b. Judge Torruella dissented. J.A. 29-90. He "express[ed] no opinion" about "whether the 'use' of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact," J.A. 33, and acknowledged that the common-law sources cited by the Government may suggest "that a common-law battery by 'bodily injury' or 'infliction of harm' can be committed recklessly." J.A. 72 (citing Model Penal Code § 211.1(1)(a) (1980) and 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 16.2(a), 16.2(c)(2) (2d ed. 2003) (LaFave)).

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purposes of Section 16 or the "crime of violence" sentencing enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). J.A. 14-18 & n.3.; see *Castleman*, 134 S. Ct. at 1414 & n.8.

Nonetheless, because he found that the Maine assault statute's offensive physical contact prong did not require intentional contact with the victim, Judge Torruella concluded that the Maine statute was broader than the common-law definition of battery, which, in his view, consisted only of the "*intentional* application of unlawful force against the person of another." J.A. 34 (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)). He therefore would have held that petitioners' Maine assault convictions were not "misdemeanor crime[s] of domestic violence" under Section 922(g)(9). J.A. 34 n.9; see J.A. 75-76.

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioners' convictions for misdemeanor domestic assault under Maine law for intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact qualified as "misdemeanor crime[s] of domestic violence" under 18 U.S.C. 922(g)(9). Petitioners' exclusion of crimes with a mens rea of recklessness is unfounded, would conflict with Congress's intention to enact a nationwide ban on firearms possession by domestic abusers, and would frustrate enforcement of the statute.

A. Because Congress enacted Section 922(g)(9) to bar firearms possession by domestic abusers, who "were (and are) routinely prosecuted under generally applicable assault or battery laws," this Court in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), concluded that Congress intended "misdemeanor crime[s] of domestic violence" to encompass conduct that would satisfy the elements of common-law battery. *Id.* at 1411 (quoting *United States* v. *Hayes*, 555 U.S. 415, 427 (2009)). Common-law battery widely

proscribed reckless infliction of bodily injury or offensive touching. The majority of States' misdemeanor assault and battery statutes penalize reckless causation of bodily injury or offensive contact. Similarly, the courts of appeals have interpreted the federal misdemeanor assault statutes, 18 U.S.C. 113(a)(4) and (5), in accordance with the common-law definition of battery, uniformly concluding that it proscribes reckless conduct.

The Maine assault statute—which penalizes reckless causation of bodily injury and intentional contact that is reckless as to offensiveness—falls within the scope of the common-law battery offense. This Court should reject petitioners' contention that, at common law, battery by offensive touching required a different, higher level of mens rea than battery resulting in physical injury. Recklessness suffices for both.

B. In construing the term "misdemeanor crime of domestic violence," there is no incongruity in reading "use * * * of physical force" to encompass reckless infliction of harm. Rather, in this context, *Castleman* held that Congress used the phrase "use * * * of physical force" to invoke the elements of common-law battery, which included reckless conduct. See 134 S. Ct. at 1410-1415.

This interpretation, moreover, accords with *Castleman*'s conclusion that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." 134 S. Ct. at 1414. Both reckless and knowing conduct include an element of intentionality and volition, as the court of appeals correctly found. The only distinction between knowledge and recklessness is the degree of risk: knowledge may be satisfied if "a person is aware of a *high probability*" of

the existence of a fact, Model Penal Code § 2.02(7) (1985) (emphasis added), while recklessness requires the conscious disregard of a "substantial and unjustifiable risk that the material element * * * will result from his conduct," *id.* § 2.02(2)(c).

The definition of a "misdemeanor crime of domestic violence" under Section 922(g)(9) does not embody the same meaning as the term "crime of violence" under 18 U.S.C. 16. In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court reserved the question whether a "crime of violence" under Section 16 includes crimes that can be committed recklessly. And while many courts of appeals have extended *Leocal* to exclude reckless offenses from Section 16, important textual and contextual differences counsel against according Section 16 and Section 922(g)(9) the same meaning. Most prominently, Congress chose not to incorporate Section 16's definition into Section 922(g)(9), thereby suggesting that it intended those provisions to be interpreted differently. Moreover, while both provisions contain the phrase "use * * * of physical force," the misdemeanor crime of domestic violence definition omits the remainder of Section 16's definition—"against the person or property of another"—which was critical to *Leocal*'s determination that Section 16 required a "higher *mens rea*." 543 U.S. at 11; compare 18 U.S.C. 16 with 18 U.S.C. 921(a)(33)(A). *Leocal*, moreover, did not consider the phrase "use * * * of physical force" as a term of art in the context of domestic violence and common-law battery. See *Castleman*, 134 S. Ct. at 1410.

C. Petitioners' interpretation of Section 922(g)(9) would render its firearm prohibition inapplicable to a substantial majority of state misdemeanor assault and

batteries as a categorical matter, and could render Section 922(g)(9) a practical nullity on federal lands. Such a result would frustrate Congress's clear intent to prohibit firearms possession by "domestic abusers" prosecuted under the "generally applicable" misdemeanor assault and battery laws. *Hayes*, 555 U.S. at 426-427. Regardless of whether state assault and battery statutes are divisible as to mental state under *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), the practicality of obtaining and using state court records to differentiate the mens rea involved in any particular misdemeanor domestic violence conviction is doubtful: misdemeanors are frequently charged by tracking the statutory language; underlying records are scarce in misdemeanor cases; and the federal background check process, see 18 U.S.C. 922(s) and (t), provides only three business days to verify a person's eligibility for firearms purchase or transfer.

D. The other policy considerations petitioners identify do not support their position that reckless conduct should be excluded from Section 922(g)(9). Their concern that Section 922(g)(9) might apply to "minor" instances of domestic abuse results from Congress's decision to expand the firearms prohibition to *misdemeanor* crimes of domestic violence, not from the inclusion of statutes that may involve reckless infliction of harm. *Castleman*, moreover, rejected the view that Section 922(g)(9) was limited to convictions based on especially severe conduct. 134 S. Ct. at 1416.

E. The rule of lenity has no application here. Nor is petitioners' construction justified because of asserted constitutional doubts. Section 922(g)(9) is not grievously ambiguous, when construed in light of the relevant tools of statutory construction. And because

disarming persons with domestic violence convictions advances Congress's compelling interest in preventing domestic gun violence, inclusion of reckless battery raises no serious Second Amendment question.

ARGUMENT

PETITIONERS' MISDEMEANOR DOMESTIC ASSAULT CONVICTIONS QUALIFY AS "MISDEMEANOR CRIME[S] OF DOMESTIC VIOLENCE" UNDER SECTION 922(g)(9)

A. *Hayes* and *Castleman* Establish That A Misdemeanor Crime Of Domestic Violence Includes Offenses Equivalent To Common-Law Battery, Which Proscribed Reckless Conduct

This Court has twice interpreted the term "misdemeanor crime of domestic violence," first in *United States* v. *Hayes*, 555 U.S. 415 (2009), and again in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014). In each case, the Court confirmed that Section 922(g)(9) targets convictions for misdemeanor domestic assault and battery that satisfy the definition of common-law battery.[2] Longstanding common-law tradition defined battery to include the recklessness causation of bodily injury or offensive contact. This common-law tradition of proscribing reckless battery has been followed by a majority of States and the Model Penal Code, and it has been used by the courts of appeals to construe

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[2] This brief uses the terms "assault," "battery," or "assault and battery" interchangeably to connote a completed battery. Notwithstanding traditional distinctions between these terms, in modern parlance, the terms "assault" and "battery" are frequently used interchangeably. See *United States* v. *Delis*, 558 F.3d 177, 181 (2d Cir. 2009); see 2 LaFave § 16.1(a), at 551 & n.2; see also Model Penal Code § 211.1 Comment 1(a) and (b), at 175-180 (1980).

provisions of the federal assault statute, 18 U.S.C. 113(a), to penalize reckless causation of bodily injury. See Part C.1, *infra*. It follows from *Hayes* and *Castleman* that misdemeanor federal, state, and tribal battery statutes requiring a mens rea of recklessness qualify as misdemeanor crimes of domestic violence under Section 922(g)(9).

1. Section 922(g)(9) was intended to cover statutes that satisfy the elements of common-law battery

In *Hayes* and *Castleman*, this Court found that Section 922(g)(9) was enacted to bar firearms possession by domestic abusers, who "were (and are) routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 555 U.S. at 427 For this reason, the Court explained, "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Castleman*, 134 S. Ct. at 1411.

Castleman considered the meaning of "use * * * of physical force" in Section 921(a)(33)(A)'s definition of misdemeanor crime of domestic violence—the identical phrase that is at issue here—and concluded that Section 921(a)(33)(A)'s definition incorporated the "common-law meaning of 'force'—namely, offensive touching." See 134 S. Ct. at 1410. *Castleman*, like *Hayes*, emphasized the "routine" use of "generally applicable assault or battery laws" to prosecute domestic abusers in concluding that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411 (citing *Hayes*, 555 U.S. at 427).

For that same reason, *Castleman* held that a requirement of "violent force" "would have rendered § 922(g)(9) inoperative in many States at the time of its enactment." 134 S. Ct. at 1413. The Court therefore rejected an interpretation of "misdemeanor crime of domestic violence" that would have made Section 922(g)(9) ineffectual in at least ten States, where the misdemeanor assault and battery statutes penalized offensive touching, but not the causation of bodily injury. *Ibid.* *Castleman*'s reasoning thus confirmed the conclusion in *Hayes* that generic misdemeanor assault and battery are the core offenses targeted by Section 922(g)(9), and that their inclusion in its scope is critical to effectuating Congress's purpose "to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms." See J.A. 19.

2. Common-law battery encompasses the reckless causation of bodily injury or offensive contact

Although petitioners agree that *Castleman* "dictates that the common-law definition of battery must be used to interpret the phrase 'use * * * of physical force' in 18 U.S.C. 921(a)(33)(A)," Br. 13 (capitalization omitted), they contend that common-law battery—at least to the extent it involved offensive touching, rather than causation of bodily injury—must have been committed intentionally or knowingly, and thus "required a *mens rea* greater than recklessness," Br. 9, 15-17. But common law did not draw the distinction petitioners suggest between battery resulting in bodily injury and battery involving offensive touching. That distinction would also be inconsistent with this Court's reasoning in *Castleman*. In any event, a rule that required a higher mens rea only for offensive

touching would not assist petitioners because their argument is premised on an incorrect interpretation of offensive physical contact under Maine's assault statute. Contrary to petitioners' view, that statute requires a defendant to intentionally (not recklessly) make contact with the victim and allows for recklessness only as to the contact's offensive nature.

a. *Common-law battery was satisfied with a mens rea of recklessness*

Common law defined "battery" as generally including "the unlawful application of force to the person of another." 2 LaFave § 16.2, at 552. Battery included not only causation of bodily injury, but also offensive touching. See 3 William Blackstone, *Commentaries on the Laws of England* 120 (1768) (Blackstone) (defining battery as "the unlawful beating of another" and noting that "[t]he least touching of another's person wilfully, or in anger, is a battery"); see *Castleman*, 134 S. Ct. at 1410 ("[T]he element of force in the crime of battery was satisfied by even the slightest offensive touching.") (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)) (internal quotation marks omitted).

Multiple sources agree that common-law battery proscribed reckless conduct. Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 126 (1946); 6A C.J.S. *Assault* § 85 (2004); see 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 60, at 32 (rev. 6th ed. 1877) (Bishop) ("It is not necessary, in simple assault, that there should be the specific purpose to do a particular injury, but general malevolence or recklessness is sufficient."); see also Model Penal Code § 211.1 comment (n.62) (1980) (While "[t]here was some difference of

opinion in prior law as to whether reckless injuring could be prosecuted under then-prevailing battery statutes," "[m]ost courts held that it could."); see also, *e.g.*, *Commonwealth* v. *Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (reckless shooting qualifies as a battery). Although some courts have spoken of criminal battery as requiring "intent" to injure, most have treated reckless or criminally negligent conduct as supplying the necessary intent. See 2 LaFave § 16.2(c)(2), at 556 & n.32; Perkins, *supra*, at 125-126; Model Penal Code § 211.1 comment (n.62) (The "necessary intent to injure could be inferred from recklessness.").[3]

Similarly, courts have often described battery as a "general intent" crime. See *United States* v. *Delis*, 558 F.3d 177, 180 (2d Cir. 2009) (citing authority). While there is some historic ambiguity to the term, compare *United States* v. *Bailey*, 444 U.S. 394, 403-404 (1980), with *Carter* v. *United States*, 530 U.S. 255, 268 (2000), "general intent" traditionally encompassed not only purposeful, but also knowing and reckless conduct. See Model Penal Code § 2.02(3) & explanatory note, at 226, 228 ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a

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[3] In *Johnson*, the Court described the element of "force" in common-law battery as "consist[ing] of the *intentional* application of unlawful force against the person of another." 559 U.S. at 139 (emphasis added); see also U.S. Br. at 11, 24, 32-33, *Castleman*, 134 S. Ct. 1405 (Nov. 15, 2013) (No. 12-1371) (arguing that intentional offensive touching or causation of bodily injury constitutes the "use * * * of force"). Nonetheless, neither the Court in *Johnson* nor the United States in its brief in *Castleman* considered directly the question presented here of whether reckless battery could also constitute the "use * * * of force" in the domestic violence context addressed by Section 922(g)(9).

person acts purposely, knowingly or recklessly * * * There is a rough correspondence between this provision and the common-law requirement of 'general intent.'").

Applying these principles, the courts of appeals have uniformly agreed that common-law battery penalized reckless causation of bodily injury or offensive contact. See *Delis*, 558 F.3d at 180 ("Common-law battery did not require any specific intent either to injure or to touch offensively, but rather only a more general intent to commit the unlawful act or, indeed, mere recklessness or criminal negligence."); *United States* v. *Zunie*, 444 F.3d 1230, 1234 (10th Cir. 2006) (holding that federal assault resulting in serious bodily injury "is a general intent crime," which, under the common law and the Model Penal Code, "encompasses crimes committed with purpose, knowledge, or recklessness"); *United States* v. *Loera*, 923 F.2d 725, 728 (9th Cir.) ("At common law a criminal battery was shown if the defendant's conduct was reckless.") (citing 2 F Wharton, *Wharton's Criminal Law* § 178, at 296 (C. Torcia 14th ed. 1979)), cert. denied, 502 U.S. 854 (1991); see also *United States* v. *Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) ("The slightest willful offensive touching of another constitutes a battery at common law, regardless of whether the defendant harbors an intent to do physical harm."); *United States* v. *Recinos*, 410 Fed. Appx. 544, 548 (3d Cir. 2011) (not precedential opinion) ("There is no requirement under the common law that the actor have a specific intent to violate the law or to cause any particular type of harm. He need only intend to commit the act that results in the unconsented and harmful touching of another."); cf. *United States* v. *Bayes*,

210 F.3d 64, 69 (1st Cir. 2000) (Common-law battery "did not require an intent to cause or to threaten an injury as long as the defendant touched another in a deliberately offensive manner without a valid reason to do so."). Accordingly, those courts have interpreted the misdemeanor provisions of the federal assault statute, 18 U.S.C. 113(a)(4) and (5), which are silent as to mens rea, to include reckless causation of bodily harm or offensive contact.[4]

The authorities cited by petitioners (Br. 15-17) only further confirm that common-law battery—whether by offensive touching or causation of bodily injury—could be proven by reckless, or even criminally negligent, conduct. Petitioners rely on the dictionary definitions of the terms "battery" and "willfully," but they fail to provide the complete definitions of such terms, which define them to include reckless conduct.

First, petitioners seek support in *Black's Law Dictionary*'s definition of "battery," which states that battery involves "the intent to cause harmful or offen-

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[4] Section 113(a) currently contains eight subsections defining different forms of federal assault. The first three of those provisions, which establish felony offenses, contain an express intent requirement. See 18 U.S.C. 113(a)(1) (assault with intent to commit murder); 18 U.S.C. 113(a)(2) (assault with intent to commit any felony); 18 U.S.C. 113(a)(3) (assault with a dangerous weapon). One subsection, proscribing the felony of "[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating," 18 U.S.C. 113(a)(8), expressly provides that it may be committed "intentionally, knowingly, or recklessly." The remaining subsections—including the misdemeanors of "[a]ssault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), and "[s]imple assault," 18 U.S.C. 113(a)(5); and the felony offenses of "[a]ssault resulting in serious bodily injury," 18 U.S.C. 113(a)(6), and "assault resulting in substantial bodily injury" to a specified domestic relation, 18 U.S.C. 113(a)(7)—contain no mens rea requirement.

sive contact." Pet. Br. 16. But petitioners omit the remainder of the definition, which provides that the "mental state" for battery "may be an intent to kill or injure, or criminal negligence, or perhaps the doing of an unlawful act." *Black's Law Dictionary* 182 (10th ed. 2014). This definition, when read in full, therefore supports the view that common-law battery proscribed not only reckless conduct, but even criminally negligent conduct.[5]

Similarly, petitioners recite Blackstone's oft-cited description of battery as the "[t]he least touching of another's person wilfully, or in anger," and, again rely on *Black's Law Dictionary* to define "willfully" to be "stronger than *voluntary* or *intentional*" and "traditionally the equivalent of *malicious*, *evil*, or *corrupt*." Pet. Br. 16 & n.6 (quoting Blackstone, *supra*, at 120, and *Black's Law Dictionary* 1834). But *Black's Law Dictionary*'s complete entry for "willful" provides that willful acts include not only "conscious wrong or evil purpose on the part of the actor," but also "at least inexcusable carelessness."[6] Indeed, this Court has

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[5] Criminal negligence requires a "high[er] degree" of risk of injury than the "ordinary (tort)" standard. 2 LaFave § 16.2(c)(2), at 557 (noting that cases have left it unclear whether "the defendant must subjectively realize the risk."); see Model Penal Code § 2.02 Comment 4, at 241 (1985) (explaining, as to negligence, that culpability is typically judged "in terms of an objective view of the situation as it actually existed" and "not in terms of * * * the actor's perceptions"). The Maine law at issue here does not penalize criminal negligence. See Me. Rev. Stat. Ann. tit 17-A, § 207(1)(A) (2006) (covering assault when a person acts "intentionally, knowingly, or recklessly").

[6] Similarly, "[m]alicious" is defined as "substantially certain to cause injury" *or* "without just cause or excuse." *Black's Law Dictionary* 1101; *United States* v. *Doe*, 136 F.3d 631, 635 (9th Cir.

observed that, while the word "willfully" is sometimes said to be "a word of many meanings," the standard common-law usage of the term "willfully" for civil offenses—and battery was categorized in Blackstone's era as a private tort—"treated actions in 'reckless disregard' of the law as 'willful' violations." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, (2007) (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)); see Blackstone, *supra*, at 120.[7] Blackstone's use of the term "willful" is therefore fully consistent with battery's inclusion of reckless infliction of harm.

The cases cited by petitioners similarly fail to assist them. For example, in *Lynch* v. *Commonwealth*, 109 S.E. 427 (1921), the Supreme Court of Virginia noted that "not every * * * touching" is a battery and that determining whether a battery occurs depends

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1998) ("'[M]aliciously' means that state of mind which actuates conduct injurious to others without lawful reason, cause or excuse."), cert. denied, 526 U.S. 1041 (1999); *United States* v. *Gullett*, 75 F.3d 941, 947 (4th Cir.) ("At common law, one acted 'maliciously' if he or she acted intentionally *or with willful disregard* of the likelihood that damage or injury would result.") (emphasis added), cert. denied, 519 U.S. 847 (1996).

[7] This Court has further described the meaning of "willfully" at common law as follows:

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

United States v. *Murdock*, 290 U.S. 389, 394-395 (1933) (citations omitted). The term "willfully" at common law thus did not connote specific intent.

"upon the intent of the actor." *Id.* at 428. But the crucial intent in that case was not an intent to injure or offend—indeed, the defendant had professed that he "did not mean to insult [the victim]"—but rather an intent to "continue the conversation [with the victim] in the hope of overcoming her objection" to his sexual advances. *Ibid.* So long as the touching was intentional and offensive, it did not matter whether the resulting offense was intended. *Ibid.*

In *Razor* v. *Kinsey*, 55 Ill. App. 605 (1894)—an obscure intermediate state court decision that says little about the general practice at common law—the court found the trial court erred by allowing a plaintiff to recover in a civil action for assault and battery where his injuries were "unintentional and without negligence on the part of the defendant." *Id.* at 613. But the court added that "wantonness"—a term that "means reckless," *Smith* v. *Wade*, 461 U.S. 30, 40 n.8 (1983)—may supply the requisite intent for common-law battery. *Razor*, 55 Ill. App. at 614.

Finally, *Cluff* v. *Mutual Benefit Life Insurance Co.*, 95 Mass. (13 Allen) 308 (1866), merely stands for the proposition that someone guilty of common-law assault—which requires no actual touching, but only a threat or perceived threat of violence—must have intended to threaten or harm the victim. It says nothing about the requisite mens rea for battery.

In sum, even petitioners' selective citation to common law demonstrates that common-law battery encompassed reckless conduct, and did not require intent to injure or offend.

b. Petitioners draw a false distinction between the mental state required for assaults resulting in offensive touching and the mental state required for assaults resulting in bodily injury

Petitioners contend (Br. 17) that, even if reckless causation of bodily injury amounts to common-law battery, reckless offensive physical contact does not. Petitioners thus attempt to narrow the question presented by claiming that "unless [this] Court determines that reckless offensive touching qualifies as 'use of physical force,' it must overturn petitioners' convictions." Br. 9. Contrary to petitioners' contentions, common law did not distinguish between batteries that result in physical injury from those that involve offensive contact, and therefore did not provide for a heightened mental state where only offensive touching was at issue. Rather "[a]t common law, battery—all battery, and not merely battery by the merest touching—was a misdemeanor, not a felony." *Johnson*, 559 U.S. at 141; accord Blackstone, *supra*, at 120; Bishop, *supra*, § 72, at 38. Reckless causation of bodily injury or offense sufficed in either case.

As a threshold matter, petitioners, like the dissent below, misconstrue the offensive physical contact prong of Maine's assault statute to include a defendant's "merely disregard[ing] a risk that his or her conduct will cause physical contact that a reasonable person would find [to] be offensive." J.A. 75; see Pet. Br. 12 (table). In fact, the Maine Supreme Judicial Court has held that the Maine assault statute prohibits *intentional* touching of another person where a reasonable person would be offended by that contact. See *State* v. *Pozzuoli*, 693 A.2d 745, 747 (1997) (approving jury instruction that offensive physical con-

tact requires "*knowingly intending* bodily contact or unlawful touching done in such a manner as would reasonably be expected to violate the person or dignity of the victim") (emphasis added); *State* v. *Rembert*, 658 A.2d 656, 658 (1995) (defining offensive physical contact as "[u]npermitted and *intentional* contacts with anything so connected with the body as to be customarily regarded as part of the other's person" (quoting Restatement (Second) of Torts § 18 cmt. c (1965)) (emphasis added). Nevertheless, recklessness is a permissible mens rea with respect to the offensiveness of the contact. See Me. Rev. Stat. Ann. tit 17-A, § 207(1)(A) (2006); see also *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (Offensive contact assault would be established by an intentional touching of a person on her shoulder or hip, but "recklessly touch[ing]" her genitals even though "it was not [the defendant's] purpose to engage in offensive or sexual contact."). To be convicted of assault under Section 207, therefore, a person must deliberately make contact with the victim, but may be held liable where he is reckless as to the resulting harm, *i.e.*, the offensiveness of the contact.

Petitioners, in any event, wrongly distinguish (Br. 17) the causation of bodily injury from offensive physical contact on the ground that the former causes "harm" while the latter does not. That argument incorrectly presumes that no harm results from offensive physical contact. To the contrary, the harm of such touching is not the touch itself, but rather the offense caused. See Blackstone, *supra*, at 120 ("The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence[,] * * * every man's

person being sacred, and no other having a right to meddle with it, in any the slightest manner."); see also *Johnson*, 559 U.S. at 146 (Alito, J., dissenting) ("[The common law] recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious than the use of force that is sufficient to inflict physical pain or injury (for example, a sharp slap in the face).").

Indeed, this Court's decision in *Castleman* rested on the common-law conception of battery to conclude that the *degree* of force is not determinative of whether conduct constitutes the "use * * * of physical force." This conclusion led the Court to hold that offensive touching qualifies as a "misdemeanor crime of domestic violence" under Section 922(g)(9). 134 S. Ct. at 1410 (quoting *Johnson*, 559 U.S. at 139; and citing Blackstone, *supra*, at 120); see also *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001) ("[Offensive physical contacts] invariably emanate from the application of some quantum of physical force, that is, physical pressure exerted against a victim."); *United States* v. *Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999) ("[Insulting or offensive contact], by necessity, requires physical force to complete."). *Castleman* thus established that the distinction between causation of offensive physical contact and causation of bodily injury is immaterial—both involve "force" under Section 922(g)(9). As the court of appeals correctly observed, "[i]f the husband's knife grazes his wife or harms her grievously, it is an assault all the same." J.A. 24; see J.A. 19 ("[Petitioners] concede that reckless causation of bodily injury is use of physical force. We see no reasoned argument that offensive physical contact does not similarly entail the use of force simply be-

cause it is inflicted recklessly as opposed to intentionally."). As properly construed, the Maine assault statute—by including reckless causation of bodily injury or offensive physical contact—therefore fits comfortably within the common-law definition of battery.

B. Reckless Battery Satisfies The "Use Of Force" Requirement Under Section 921(a)(33)(A)'s Definition Of "Misdemeanor Crime Of Domestic Violence"

Petitioners argue that the phrase "use * * * of physical force" in the definition of "misdemeanor crime of domestic violence," 18 U.S.C. 921(a)(33)(A), requires "intentional and purposeful" rather than reckless conduct. See Br. 17. But petitioners' interpretation takes that phrase out of context. Common-law battery, *by definition*, has as an element the "use * * * of physical force" even where bodily injury or offensive contact was recklessly inflicted. And Section 921(a)(33)(A)'s definition of "misdemeanor crime of violence" is properly understood as a direct reference to the contemporary and common-law misdemeanor crime of battery.

*1. Common-law battery necessarily entailed the "use * * * of physical force" even where it involved reckless conduct*

Petitioners contend that the "plain meaning of the verb 'use' and the phrase 'use . . of physical force'" requires "intentional and purposeful conduct—and thus does not extend to merely reckless conduct." Br. 17. That is incorrect. These terms must be interpreted as "common-law term[s] of art" and defined by the background rule of common-law battery that reckless infliction of harm is sufficient. See *Castleman*, 134 S.

Ct. at 1410 (defining the word "force" in the phrase "use * * * of physical force" according to its common-law meaning); see also Part A.2, *supra*.

Castleman declined to reach the question whether reckless causation of bodily injury constitutes the "use * * * of physical force," but the Court's reasoning compels the conclusion that it does. 134 S. Ct. at 1413-1414. *Castleman* explained that "the element of force in the crime of battery was 'satisfied by even the slightest offensive touching'" and that it is therefore "impossible to cause bodily injury without *applying force* in the common-law sense." *Id.* at 1410 (quoting *Johnson*, 559 U.S. at 139). Put another way, "[f]orce * * * describ[es] one of the elements of the common-law crime of battery." See *ibid.* (citation omitted). Seen in this light, when Congress incorporated the phrase "use * * * of physical force" into Section 921(a)(33)(A), it directly invoked the crime of common-law battery, including the reckless conduct that battery traditionally proscribed.

Castleman did not involve a conviction based on a mens rea of recklessness, 134 S. Ct. at 1414, and the Court therefore formally extended this reasoning only to "the knowing or intentional application of force," *id.* at 1415. But the same logic fully applies to reckless battery. That is especially true given the close kinship between reckless and knowing conduct in the criminal law. Reckless causation of bodily injury—like knowing causation of bodily injury—requires an intent to act and actual subjective knowledge that bodily injury may result from that action; the only difference is the degree of the known risk. Recklessness requires that the defendant "consciously disregard[] a substantial and unjustifiable risk that the material element * * *

will result from his conduct." Model Penal Code § 2.02(2)(c); see *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994) (Reckless conduct occurs when "a person disregards a risk of harm of which he is aware."). [8] In the case of knowing conduct, the result must be "practically certain," Model Penal Code § 2.02(2)(b)(ii)—but that is a degree of risk that still "includes a contingency factor," which can be satisfied if "a person is aware of a *high probability* of the existence of a fact, unless he actually believes that [the fact] does not exist," *id.* § 2.02(7) (emphasis added); *id.* § 2.02 comment (n.13) (emphasis added); see also 1 LaFave § 5.2(b), at 247-248. [9]

Accordingly, reckless conduct is not, as petitioners claim, "accidental conduct," which the term "use" may exclude. Pet. Br. 10; cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("[U]se * * * of physical force against the person or property of another" under 18 U.S.C. 16 "most naturally suggests a higher degree of intent than negligent or merely accidental conduct."). Rather, recklessness is akin to knowing conduct in all but the degree of risk. Thus, although "we would not ordinarily say a person 'use[s] * * * physical force against' another by stumbling and falling into him," "a person would 'use * * * physical force against' an-

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[8] Recklessness further requires that the disregard of the risk "involve[] a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation," "considering the nature and purpose of the actor's conduct and the circumstances known to him." Model Penal Code § 2.02(2)(c).

[9] Maine's definition of these mental states is substantively similar to the Model Penal Code formulation. Compare Me. Rev. Stat. Ann. tit. 17-A, § 35(3) (Supp. 2015) (defining "Recklessly"), with Model Penal Code § 2.02(2)(c).

other when pushing him." *Leocal*, 543 U.S. at 9. And that is true even if he did not intend to injure or offend him in doing so, but appreciated the substantial risk of injury or offense and disregarded it.

This interpretation further comports with *Castleman*'s description of commonplace acts of "[d]omestic violence" as including "pushing, grabbing, shoving, slapping, and hitting," or a "squeeze of the arm [that] causes a bruise." 134 S. Ct. at 1412 (citation and internal quotation marks omitted). All of these acts could be carried out in a manner that is reckless as to the infliction of bodily injury or offense. But to exclude reckless conduct would be to exclude exactly those familiar forms of domestic abuse from Section 922(g)(9). Congress could not have intended that result.

Here, the court of appeals correctly observed that "Maine's definition of 'recklessly,' like its definition of 'knowingly' [(and unlike negligence)], includes an element of intentionality and specificity." J.A. 21; see also *Elonis* v. *United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) ("Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway."); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1141 (9th Cir. 2006) (en banc) (Wardlaw, J., dissenting) ("Conscious disregard includes an element of volition: One must be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that

risk.") (citation omitted).[10] In line with these principles, where a law is silent on the applicable mental state, "such element is established if a person acts purposely, knowingly, or recklessly." See Model Penal Code § 2.02(3).[11]

2. The term "misdemeanor crime of domestic violence" bears a different meaning than the definition of "crime of violence" under 18 U.S.C. 16

Petitioners contend (Br. 17-22) that this Court should adopt the same definition of "use"—to mean "active employment" for a particular purpose—that the Court applied in *Leocal*, 543 U.S. at 10, to construe the phrase "use * * * of physical force against the person or property of another" in the definition of

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[10] This Court thus has found reckless conduct to be morally culpable in a wide variety of contexts. *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) (citing *Farmer*, 511 U.S. at 835-836 (deliberate indifference to an inmate's harm)); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) (criminal libel); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (civil libel). Indeed, "reckless disregard for human life" is a "highly culpable mental state that may support a capital sentencing judgment." *Tison* v. *Arizona*, 481 U.S. 137, 157-158 (1987).

[11] Negligence, by contrast, is a wholly objective standard, which is established when a reasonable person would have been aware of the risk of harm, even if the perpetrator had no actual subjective knowledge of those risks. Model Penal Code § 2.02(2)(d). This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes," because that standard depends on the viewpoint of a "reasonable person," "regardless of what the defendant thinks," which "is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Elonis*, 135 S. Ct. at 2011 (citations omitted).

"crime of violence" under 18 U.S.C. 16.[12] *Leocal* held that the requirement that force be used "against" someone or something suggested that crimes of violence require "a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9. *Leocal* reserved the question whether a reckless application of force could constitute a "use" of force, 543 U.S. at 9, 13; but a footnote in *Castleman* cited decisions from the courts of appeals, which, after *Leocal*, held that certain reckless offenses did not qualify as "crimes of violence" under Section 16 or under the definition of felony "crime of violence" used in Sentencing Guidelines § 2L1.2.[13] 134 S. Ct. at 1414 n.8. Only one case cited in the footnote in *Castleman* interpreted Section 922(g)(9)—the First Circuit's opinion in *United States* v. *Booker*, 644 F.3d 12 (2011), cert. denied, 132 S. Ct. 1538 (2012)—and that case

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[12] Section 16 defines the term "crime of violence" to mean "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16.

[13] Two courts of appeals, both circuits cited within the *Castleman* footnote, have found, after *Leocal*, that certain crimes with a recklessness mens rea may qualify as crimes of violence under Section 16. See *Aguilar* v. *Attorney Gen.*, 663 F.3d 692, 695-700 (3d Cir. 2011) (sexual assault with a mens rea of recklessness is a crime of violence under Section 16(b)); see also *Zunie*, 444 F.3d at 1235 n.2 (10th Cir.) (noting that the court of appeals' pre-*Leocal* holding—that assault resulting in serious bodily injury under Section 113(a)(6) is a crime of violence under Section 16(a)—was consistent with an interpretation of Section 113(a)(6) that includes reckless assault because *Leocal* excluded only negligent conduct from Section 16's crime of violence definition).

held that a misdemeanor crime of domestic violence *does* include reckless battery. See *Castleman*, 134 S. Ct. at 1414 & n.8.[14] Since *Castleman*, no court of appeals has held that reckless conduct is insufficient to establish a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9).[15]

Far from supporting petitioners, *Castleman* rejected petitioners' contention that "misdemeanor crime of domestic violence" under Section 922(g)(9) has the same meaning as "crime of violence" under Section 16. The Court declined to interpret the term "use * * * of physical force" in Section 16 and Section 922(g)(9) *in pari materia* as to the requisite de-

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[14] The remaining cases in *Castleman*'s footnote, 134 S. Ct. at 1414 n.8, addressed only the requisite mens rea for either an aggravated felony pursuant to immigration statutes that directly incorporate Section 16's definition of "crime of violence," see *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 559-563 (7th Cir. 2008); *United States* v. *Torres-Villalobos*, 487 F.3d 607, 613-617 (8th Cir. 2007); *Fernandez-Ruiz*, 466 F.3d at 1124-1132 (9th Cir.) (8 U.S.C. 1227(a)(2)(E)(i)); *Garcia* v. *Gonzales*, 455 F.3d 465, 467-469 (4th Cir. 2006); *Oyebanji* v. *Gonzales*, 418 F.3d 260, 263-265 (3d Cir. 2005); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372-376 (2d Cir. 2003); *United States* v. *Chapa-Garza*, 243 F.3d 921, 924-928 (5th Cir. 2001), or the definition of a felony "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1), see *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010); *United States* v. *Zuniga-Soto*, 527 F.3d 1110, 1123-1125 (10th Cir. 2008); *United States* v. *Portela*, 469 F.3d 496, 498-499 (6th Cir. 2006).

[15] In *United States* v. *Vinson*, 805 F.3d 120 (2015), the Fourth Circuit held that North Carolina assault is not a misdemeanor crime of domestic violence because the assault statute at issue allowed for conviction based on "culpable negligence." 805 F.3d at 126. Under North Carolina law, "culpable negligence" includes conduct that shows "thoughtless disregard" of consequences and thus "is a lesser standard of culpability than recklessness, which requires at least 'a conscious disregard of risk.'" *Ibid.*

gree of force. See 134 S. Ct. at 1410-1414. The same distinction holds as to the applicable mens rea.[16]

Most notably, Congress could have easily defined "misdemeanor crime of domestic violence" by incorporating Section 16's definition of "crime of violence." See *Leocal*, 543 U.S. at 7 (noting that Section 16 has been "incorporated into a variety of statutory provisions, both criminal and noncriminal"); cf. 8 U.S.C. 1227(a)(2)(E)(i) (provision of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, defining "crime of domestic violence" as "any crime of violence (as defined in [18 U.S.C. 16])" committed against a qualifying relative). As the Court explained in *Castleman*, that Congress chose not to incorporate Section 16's definition of crime of violence "suggests, if anything, that it did not mean to." 134 S. Ct. at 1412 n.6. And *Castleman* further found that Section 922(g)(9)'s context confirmed that Congress intended a different meaning—one drawn from common law. *Id.* at 1410-1413.

Castleman reasoned that "domestic violence" is distinguishable from and broader than the terms "crime of violence" under Section 16 or "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1).[17] "[D]omestic violence,"

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[16] Because Section 922(g)(9)'s specific focus on misdemeanor domestic violence convictions differs significantly from Section 16's general definition of crimes of violence, it is unnecessary for this Court to decide whether reckless "use * * * of physical force" applies to other statutes, like Section 16, that include similar wording.

[17] The ACCA defines "violent felony" in pertinent part as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). In *Johnson*, this Court interpreted that language

the Court explained, is a "term of art" that "encompass[ed] a range of force broader than that which constitutes 'violence' *simpliciter*." 134 S. Ct. at 1411 & n.4; compare *Leocal*, 543 U.S. at 11 ("[W]e ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with [Section] 16's emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."); see also *Booker*, 644 F.3d at 19 ("[T]he case for analogizing [Section] 922(g)(9) to [Section] 16 is particularly weak.").

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A) ("use * * * of physical force") also contains an important textual difference from Section's 16's definition of "crime of violence" ("the use * * * of physical force *against the person or property of another*") (emphasis added). As the Court explained in *Leocal*, "[t]he critical aspect of [Section] 16(a) is that a crime of violence is one involving the 'use * * * of physical force *against the person or property of another*.'" 543 U.S. at 9 (emphasis original). It was because of this precise formulation—which is absent from Section 921(a)(33)(A)—that *Leocal* held that Section 16 "requir[es] a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11. And some courts of appeals have similarly relied on the "against the person or property of another" language to exclude reckless acts from Section 16. See, *e.g.*, *United States* v. *Torres-Villalobos*, 487 F.3d 607, 616

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to require "violent force," which excludes mere offensive touching, and requires "that degree of force necessary to inflict pain." 559 U.S. at 139-143.

(8th Cir. 2007) ("*Leocal* focused on the precise wording of [Section] 16.").

Section 922(g)(9) also differs in its purpose and effect from the ACCA—where three qualifying "violent felonies" subject a defendant to a 15-year mandatory minimum sentence—or Section 16's definition of "crime of violence," which has been incorporated into a broad range of criminal, sentencing, immigration, and other provisions. See *Leocal*, 543 U.S. at 7 & n.4. By contrast, Section 922(g)(9)—like the other provisions of Section 922(g)—has a single specific purpose: to disable a class of persons thought to pose a heightened risk of danger from possession of a firearm. See *Castleman*, 134 S. Ct. at 1412.

These distinctions among the statutory schemes explain why this Court found that the definition of common-law battery would create a mismatch with the term "violent felony" under the ACCA, see *Johnson*, 559 U.S. at 142, but found "no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom [Section] 922(g) disqualifies from gun ownership," *Castleman*, 134 S. Ct. at 1412. The disqualified persons include those "addicted to any controlled substance," Section 922(g)(3); most people "admitted to the United States under a non-immigrant visa," Section 922(g)(5)(B); "anyone who has renounced United States citizenship, Section 922(g)(7); and anyone "subject to a domestic restraining order," Section 922(g)(8). *Castleman*, 134 S. Ct. at 1412.

The purpose of Section 922(g)'s firearms disability is to "keep guns out of the hands" of "potentially irresponsible and dangerous" persons who "may not be trusted to possess a firearm without becoming a

threat to society." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (citation and internal quotation marks omitted); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). It is entirely consistent with Section 922(g)(9)'s purpose to include those convicted of reckless domestic batteries in this group. See *Castleman*, 134 S. Ct. at 1412 ("Whereas we have hesitated * * * to apply [the ACCA] to 'crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,' * * * we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom [Section] 922(g) disqualifies from gun ownership.") (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)).[18]

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[18] The differences between Section 922(g)(9) and 18 U.S.C. 924(c)(1)—the statute at issue in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995)—are even more stark. See Pet. Br. 17-18 (relying on those cases). The version of Section 924(c)(1) interpreted by *Smith* and *Bailey* required a five-year mandatory minimum sentence if a defendant "during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm." 18 U.S.C. 924(c)(1). In that context, the Court understood the term "use" to require "active employment," by virtue of that word's "placement and purpose in the statutory scheme," and "not only the bare meaning of the word." *Bailey*, 516 U.S. at 145, 150; see *Smith*, 508 U.S. at 228-234 (relying not only on the dictionary definition of "use," but also on Section 924(c)(1)'s entire statutory context to conclude that the phrase "uses * * * a firearm" in that statute proscribed the "use [of] a gun by trading it" for illegal drugs). For example, *Bailey* held that it was necessary to define "use" to mean active employment to avoid surplusage with the word "carries" in Section 924(c)(1). That definition of "use" was also consistent with the other subsections of Section 924 and was supported by the provision's legislative history, which suggested that Congress "intended

C. Exclusion Of Reckless Battery Would Undermine The Purpose Of The Statute

1. Petitioners' interpretation would prevent Section 922(g)(9)'s categorical application to a broad swath of statutes

Congress intended to define qualifying "misdemeanor crime[s] of domestic violence" to include generally applicable state, federal, and tribal assault and battery statutes. See *Castleman*, 134 S. Ct. at 1410-1414; *Hayes*, 555 U.S. at 427. In both *Hayes* and *Castleman*, this Court interpreted Section 922(g)(9) to effectuate that congressional purpose, and so declined to adopt contrary interpretations that would have rendered the provision a "practical nullity." See *Castleman*, 134 S. Ct. at 1418-1419. But under petitioners' interpretation, domestic batteries prosecuted under the federal misdemeanor assault provisions and a majority of state assault and battery statutes would fail to categorically qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9) because they prohibit reckless infliction of bodily harm or offensive contact.

Thirty-four States and the District of Columbia define misdemeanor assault to include the reckless causation of bodily injury. See App. B, *infra*; see 2 LaFave § 16.2(c)(2), at 557 ("In the modern codes, a substantial majority of the battery-type statutes expressly state that the crime [of battery] may be committed by recklessness—that is, where there is a subjective awareness of the high risk of physical inju-

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to reach the situation where the firearm was actively employed during commission of the crime." *Bailey*, 516 U.S. at 145-148. The text and context of Section 922(g)(9) bear none of those features.

ry.").[19] At the time of Section 922(g)(9)'s enactment, at least eight States had domestic violence assault provisions that proscribed reckless conduct expressly, or by incorporating the State's general assault and battery provision; and nine States have since added domestic assault and battery provisions that include recklessness.[20] See App. C, *infra*.

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[19] Not all States expressly define assault and battery to proscribe offensive touching, but two States have assault and battery provisions are similar to Maine's assault statute in that those states proscribe deliberate contact that is reasonably likely to cause offense, injury, or harm. See Tenn. Code Ann. § 39-13-101 (West 2015); Tex. Penal Code Ann. § 22.01(a)(3) (West 2015).

[20] In 2006, Congress amended Section 921(a)(33)(A) to expand its application to misdemeanor offenses under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083; 18 U.S.C. 921(a)(33)(A)(i). While tribal law varies, a number of tribes have assault and battery provisions that proscribe reckless causation of bodily injury. See, *e.g.*, White Mountain Apache Crim. Code § 2.4(A)(1) (defining assault as "[i]ntentionally, knowingly, or recklessly causing any physical injury to another person"); Pascua Yaqui Crim. Code § 130(A)(1) (same); Salt River Pima-Maricopa Indian Community Code of Ordinances § 6-51(a)(1) (same); Gila River Indian Community Ordinances tit. 5, § 5.602(A)(1) (similar); Sisseton-Wahpeton Oyate Codes of Law § 24-06-01(A) (similar); Confederated Tribes of Umatilla Indian Reservation Crim. Code § 4.74 (same as to mens rea, including "physical injury however slight"); see also Mississippi Choctaw Tribal Code tit. 3, § 3-10-2(1)(a) ("'Abuse/Domestic Violence' means the occurrence," "between family or household members who reside together or who formerly resided together," of "attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon."); Tohono O'Odham Criminal Code tit. 7, § 7.1(a)(4) ("A person commits the offense of assault if," *inter alia*, "recklessly or by negligence he or she causes bodily injury to another person.").

Petitioners' interpretation of Section 922(g)(9) therefore would exclude categorical coverage of the majority of state misdemeanor battery statutes, as well as a substantial number of state statutes specifically targeting domestic violence. As this Court recognized in *Hayes* and *Castleman*, Congress enacted Section 922(g)(9) to target domestic abusers, who are "routinely" convicted under the "generally applicable assault and battery laws." 555 U.S. at 427; 134 S. Ct. at 1411. Because the categorical approach looks to the *elements* of the statute rather than the underlying conduct, *Descamps* v. *United States*, 113 S. Ct. 2276, 2281 (2013), misdemeanor battery convictions in these jurisdictions for conduct this Court described as typifying domestic violence—"spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, [or] slapping"—or worse, would be insufficient to trigger Section 922(g)(9). See *Castleman*, 134 S. Ct. at 1411 n.5. It would make little sense to adopt an interpretation of Section 922(g)(9) that would render it inapplicable to a substantial majority of such offenses.

Federal law also requires only recklessness for both simple and more serious assaults. The federal assault statute punishes as misdemeanors "assault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), and "simple assault," 18 U.S.C. 113(a)(5). Neither provision specifies the required mens rea, but as discussed above, courts of appeals uniformly have held that specific intent to injure is not required.[21] See pp.

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[21] More recently, Congress added two felony provisions specifically proscribing domestic assaults: Section 113(a)(7), which penalizes "[a]ssault resulting in substantial bodily injury to a spouse or intimate partner"; and Section 113(a)(8), which penalizes "[a]s-

19-20, *supra*. Moreover, at least three courts of appeals have determined that felony assault resulting in serious bodily injury, prohibited by 18 U.S.C. 113(a)(6) (and predecessor statutes), requires proof only of recklessness. See *Zunie*, 444 F.3d at 1235 (10th Cir.) ("[A] finding of purpose, knowledge, or recklessness supports a conviction for assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6)."); *United States* v. *Ashley*, 255 F.3d 907, 911 (8th Cir. 2001) (affirming conviction under 18 U.S.C. 113(a)(6) for reckless conduct); *Loera* 923 F.2d at 728 (9th Cir.) (same as to predecessor of 18 U.S.C. 113(a)(6)); see also *United States* v. *Lewis*, 780 F.2d 1140, 1142-1143 (4th Cir. 1986) (assault resulting in serious bodily injury is a general intent crime). Petitioners' interpretation of Section 922(g)(9) would therefore render largely meaningless the statute's inclusion of offenses that are "misdemeanor[s] under Federal * * * law."[22] 18 U.S.C. 921(a)(33)(A)(i); but see Part C.3, *infra* (discussing the applicability of the modified categorical approach).

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sault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate." See 18 U.S.C. 113(a)(7) and (8). Congress expressly provided that "strangling" and "suffocating" include "intentionally, knowingly, or recklessly impeding" the victim's breathing or circulation, "regardless of whether * * * there is any intent to kill or protractedly injure the victim." See 18 U.S.C. 113(b)(4) and (5).

[22] State domestic-violence offenses occurring within the special maritime and territorial jurisdiction of the United States could be prosecuted under 18 U.S.C. 13. In addition, after Section 922(g)(9)'s enactment, Congress added two *felony* domestic-violence assault provisions, 18 U.S.C. 113(a)(7) and (8). If Sections 113(a)(4) and (5) were excluded from Section 922(g)(9), no other distinctly federal misdemeanor offense would qualify.

This Court should therefore follow the approach taken in *Hayes* and *Castleman* and decline to adopt an interpretation of Section 922(g)(9) that would render it effective in only a minority of States and would exclude the federal misdemeanors used to prosecute domestic violence. See *Hayes*, 555 U.S. 427 (finding it "highly improbable that Congress meant to extend [Section] 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers" prosecuted in States with domestic-violence specific statutes); *Castleman*, at 1413 (rejecting an interpretation of "misdemeanor crime of domestic violence" that would have made Section 922(g)(9) ineffectual in at least ten States, "encompassing 30 percent of the U.S. population").

2. Exclusion of reckless conduct would allow thousands of convicted domestic abusers to legally purchase and possess firearms

The damaging impact of petitioners' interpretation would not be limited to criminal prosecutions under Section 922(g)(9). Under the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (primarily codified at 18 U.S.C. 922(s)-(t)) (Brady Act), federally licensed firearms dealers must verify that individuals who wish to purchase firearms are not prohibited from doing so under state or federal law. See 18 U.S.C. 922(t)(1); 28 C.F.R. 25.1. That verification is performed using the National Instant Criminal Background Check System (NICS), a computer system maintained by the Federal Bureau of Investigation (FBI). See 28 C.F.R. 25.3, 25.4. NICS, in turn, advises the licensee whether a prospective purchaser is prohibited by law from possessing or receiving a firearm. See 63 Fed. Reg. 58,272 (Oct. 29, 1998).

Between NICS's creation in November 1998 and December 2014, misdemeanor crime of domestic violence convictions have accounted for more than 112,000 denials of firearms transfers—the third most common reason for denying firearms to a prospective purchaser. See FBI, *National Instant Criminal Back ground Check System (NICS) Operations 2014*, http://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report (last visited Jan. 14, 2016). If this Court were to adopt petitioners' interpretation of Section 922(g)(9), that would no longer be true. A domestic abuser who is convicted of a misdemeanor assault or battery offense against his family in the majority of States or under federal law would be able to arm himself—even though there can be no serious dispute that "the great majority of convictions under" those statutes are "based on the use of violent force." *Johnson*, 559 U.S. at 152 (Alito, J., dissenting). Petitioners' interpretations thus frustrate (if not destroy) Congress's "manifest purpose" to "keep[] firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426-427.

3. Resort to the modified categorical approach is of little assistance in the context of misdemeanor assault and battery

The practical effect of the interpretation petitioners advocate cannot be substantially mitigated by resort to the "modified categorical approach." In *Descamps* this Court explained that the modified categorical approach is available "when a prior conviction is for violating a so-called 'divisible statute,'" *i.e.*, a statute that "sets out one or more elements of the offense in the alternative." 113 S. Ct. at 2281.

Many state assault statutes enumerate alternative mental states in a single subsection, *i.e.*, proscribe "intentionally, knowingly, or recklessly" or "knowingly or recklessly" causing bodily injury. See App. B, *infra*. The courts of appeals are divided on whether a statute is divisible if it sets out, in the alternative, several forms of committing an offense, or whether instead a court may apply the modified categorical approach only if the court determines that state law would require jurors to be unanimous as to the form of the offense for which the defendant was convicted. See U.S. Br. at 17-20, *Mathis* v. *United States*, No. 15-6092 (Dec. 17, 2015) (describing courts of appeals' differing approaches to divisibility under *Descamps*).[23]

In addition, several States have found that their statutes prohibit reckless battery through judicial construction. See *e.g.*, *Commonwealth* v. *Porro*, 939 N.E. 2d 1157, 1162 (Mass. 2010) (holding that Massachusetts assault and battery statute includes reckless conduct in accordance with Massachusetts common law); *Vines* v. *United States*, 70 A.3d 1170, 1179-1181 (D.C. 2013) (simple assault under D.C. Code § 22-404(a)(1), which is silent as to mens rea, may be proven "based on purely reckless conduct"); cf. *United States v. Vinson*, 805 F.3d 120, 126 (4th Cir. 2015) (North Carolina assault statute requires intentional conduct, but intent may be proven by mere culpable negligence); see also App. B, *infra*. It is unsettled whether and how divisibility applies to such common-law elements. See *United States* v. *Hemingway*, 734 F.3d 323, 331 (4th Cir. 2013) (holding, as a matter of

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[23] On January 19, 2016, this Court granted the petition for a writ of certiorari in *Mathis* v. *United States*, No. 15-6092.

first impression, that offenses defined by State's common law were divisible under *Descamps*).

But even when the statute is divisible in theory, the modified categorical approach may often be unavailable in practice. State and local court charging documents typically track the statutory language and do not specify which mens rea is at issue, as was the case for each of the petitioners. J.A. 98, 154. Moreover, records from closed misdemeanor cases are often unavailable or incomplete. See *Johnson*, 559 U.S. at 145 (acknowledging it "may well be true * * * that in many cases state and local records from battery convictions will be incomplete").

The inaccessibility or unavailability of records thwarts not only criminal prosecution under Section 922(g)(9), but the ability of NICS to verify a person's ability to legally purchase a firearm. The Brady Act allows only a three-business-day waiting period for such verification to take place. 18 U.S.C. 922(t)(1)(B)(ii). If the firearms dealer does not receive notice that the transfer is unlawful (because of, for example, the person's prior conviction), the dealer may proceed with the transaction. *Ibid.* If reckless batteries were excluded as Section 922(g)(9) predicates, this verification process would frequently be unable to prevent firearms transfers to offenders convicted of misdemeanor domestic assault and battery under federal law and in the majority of States, which would then lack categorically qualifying assault offenses.

D. Section 922(g)(9) Is Not Limited To Only "Severe" Instances Of Domestic Abuse

Petitioners criticize (Br. 25-28) the court of appeals' view that prosecutorial discretion will prevent

Section 922(g)(9)'s application to "minor reckless acts." Petitioners contend (Br. 26-28) that changes in state law and the enactment of "mandatory arrest" and "no-drop" policies have resulted in "higher rates of minor conduct being swept into the criminal justice system." Br. 27-28. Petitioners' contentions provide no reason to truncate the application of Section 922(g)(9).

This Court in *Castleman* considered and rejected the view "that Congress * * * meant to narrow the scope of the statute to convictions based on especially severe conduct" concluding that "all Congress meant to do" in requiring prior offenses to have an element of "use * * * of physical force," "was address the fear that [Section] 922(g)(9) might be triggered by offenses in which no force at all was directed at a person." 134 S. Ct. at 1416 (citation and internal quotation marks omitted); see *id.* at 1412 ("If a seemingly minor act * * * draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence.'").

Petitioners' concern that assertedly "minor" domestic abuse may be prosecuted as assaults or batteries amounts to nothing more than a disagreement with Congress's policy judgment to expand the firearms prohibition to individuals with *misdemeanor* domestic abuse convictions. Even if domestic violence is prosecuted more readily now than twenty years ago, that does not mean that the Court should read Section 922(g)(9) to capture a narrower range of convictions by grafting onto the statute a mens rea for Section

922(g)(9) predicate offenses that Congress did not contemplate.

Similarly, petitioners' assertions (Br. 28-30 & n.11) about wrongful misdemeanor convictions or "constitutional abuses in the state misdemeanor court system" could apply to any misdemeanor offense and have nothing to do with Section 922(g)(9)'s inclusion of reckless domestic assaults.[24] Petitioners' complaint therefore is with the very premise of Section 922(g)(9), not with the inclusion of assault and battery statutes that encompass reckless conduct. See *Castleman*, 134 S. Ct. at 1408-1412; J.A. 19.

Petitioners are also incorrect that Section 922(g)(9) must be limited to intentional conduct because Congress had as one of its goals covering crimes that would have been treated as felonies "if the victim were a stranger" but resulted in misdemeanor convictions because of "[o]utdated or ineffective laws often treat domestic violence as a lesser offense." Br. 24 (quoting 142 Cong. Rec. 22,987 (1996) (statement of Sen. Feinstein)). Nothing about Section 922(g)(9)'s text, history, or context suggests that Congress meant to limit the statute to conduct that would also constitute a state-law felony, nor do petitioners provide support for the proposition that the dividing line between felonies and misdemeanors is necessarily mens rea.

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[24] While petitioners allege (Br. 29 & n.11) "widespread constitutional abuses in the state misdemeanor court systems," they do not contend there was any constitutional infirmity in their own convictions. Moreover, Section 921(a)(33)(B)(i) provides that, for any person to be considered to have been convicted of a Section 922(g)(9) predicate offense, the person must have been represented by counsel and afforded a jury trial, if he was entitled to a jury trial under the laws of the jurisdiction; or the person must have knowingly and intelligently waived such rights.

Moreover, petitioners offer no examples of "minor" convictions for domestic abuse that were not within Section 922(g)(9)'s intended scope, nor do they claim that the conduct underlying their own offenses was "minor."

E. Neither The Rule Of Lenity Nor Principles of "Avoidance Of Constitutional Doubt" Apply

1. No ambiguity in Section 922(g)(9) implicates the rule of lenity

Petitioners argue (Br. 31-36) that the rule of lenity counsels in favor of interpreting Section 922(g)(9) to require a mens rea higher than recklessness. But "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (citations and internal quotation marks omitted). No such grievous ambiguity exists in Sections 922(g)(9) and 921(a)(33)(A)—as this Court found in both *Hayes* and *Castleman*. See *Castleman*, 134 S. Ct. at 1416; *Hayes*, 555 U.S. at 429. Rather, the common-law definition of battery, as incorporated into Section 922(g)(9), makes clear that it covers predicate assault and batteries involving reckless conduct.

2. Including reckless assaults and batteries does not give rise to Second Amendment concerns

Petitioners also argue (Br. 32-36) that the Court should interpret Section 922(g)(9) to exclude reckless conduct because to do otherwise would raise "grave constitutional questions" about whether the statute violates the Second Amendment. Petitioners sought certiorari to address the question of whether Section

922(g)(9) violates the Second Amendment, but the Court declined to grant certiorari on that issue. Petitioners now seek to advance their Second Amendment arguments through the "doctrine of constitutional doubt." But to the extent this Court even entertains this argument, there is no doubt about the constitutionality of Section 922(g)(9).

The "doctrine of constitutional doubt," applies only "where a statute is susceptible of two constructions," one of which would avoid "grave and doubtful constitutional questions." *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Since this Court held in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), that the Second Amendment protects the right of law-abiding, responsible citizens to keep and bear arms for self-defense in the home, *id.* at 635, several courts of appeals have addressed the constitutionality of Section 922(g)(9) in published opinions, and none has held that the statute is unconstitutional. See *United States* v. *Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (upholding statute), cert. denied, 135 S. Ct. 187 (2014); *Booker*, 644 F.3d at 22-26 (same); *United States* v. *Skoien*, 614 F.3d 638, 641-642 (7th Cir. 2010) (en banc) (same), cert. denied, 562 U.S. 1303 (2011); *United States* v. *White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010) (same); cf. *United States* v. *Staten*, 666 F.3d 154, 162-163, 167-168 (4th Cir. 2011) (rejecting Second Amendment challenge after assuming *arguendo* that defendant was entitled to some degree of Second Amendment protection notwithstanding his conviction and relying on the degree of force required under the circuit's prior decision in *United States* v. *White*, 606 F.3d 144, 153 (4th Cir. 2010) ("violent force * * * capable of caus-

ing physical pain or injury") (citation and emphasis omitted)), cert. denied, 132 S. Ct. 1937 (2012).

Courts have also rejected Second Amendment challenges to 18 U.S.C. 922(g)(8), which prohibits possession of a firearm by a person subject to a domestic violence protective order. See *United States* v. *Chapman*, 666 F.3d 220, 224-231 (4th Cir. 2012); *United States* v. *Bena*, 664 F.3d 1180, 1182-1185 (8th Cir. 2011); *United States* v. *Reese*, 627 F.3d 792, 799-805 (10th Cir. 2010), cert. denied, 563 U.S. 990 (2011).

Whatever the level of scrutiny to be applied to a Second Amendment challenge to Section 922(g)(9), its firearms prohibition passes constitutional review. As the court of appeals below explained in its earlier decision in Armstrong's case, "a sufficient nexus exists * * * between the important government interest" in "preventing domestic gun violence" and disarming misdemeanants who engage in physical force of the sort proscribed by Maine's assault statutes. *Armstrong*, 706 F.3d at 7-8 (quoting *Booker*, 644 F.3d at 26). That conclusion is supported by a substantial body of empirical evidence that "[f]irearms and domestic strife are a potentially deadly combination." *Castleman*, 134 S. Ct. at 1408 (quoting *Hayes*, 555 U.S. at 427); see, *e.g.*, *id.* at 1409 (citing evidence that "[w]hen a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed"); see also *Staten*, 666 F.3d at 163-167; *Booker*, 644 F.3d at 25-26; *Skoien*, 614 F.3d at 642-644. Restrictions on firearm possession by persons convicted of abusing their domestic partners bear a clear connection to the important goals underlying Section 922(g)(9).

Petitioners argue (Br. 34) that reading Section 922(g)(9) to allow reckless causation of bodily harm or offensive physical contact "weakens the nexus between the prohibited conduct and the law's objectives." But the law's objective was to remove firearms from the hands of people who abuse their family members, even if that abuse results from "domestic arguments [that] 'get out of control,'" and assaults that a partner commits "'almost without knowing what he is doing.'" J.A. 20 (quoting 142 Cong. Rec. at 26,674). Individuals convicted of assaults and batteries under the common-law definition—reaching reckless as well as purposeful acts of domestic violence—fall within Congress's core concern of keeping guns out of the hands of those previously convicted of domestic violence crimes.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. 18 U.S.C. 113 provides:

Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.

(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

(b) As used in this subsection—

(1) the term "substantial bodily injury" means bodily injury which involves—

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title.

3. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C)[2], the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was

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[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized.

entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * * * *

4. 18 U.S.C. 922 provides in pertinent part:

Unlawful Acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical

force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

5. 18 U.S.C. 924 provides in pertinent part:

Penalties

(e)(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

APPENDIX B

STATE MISDEMEANOR ASSAULT AND BATTERY STATUTES IN EFFECT WHEN SECTION 922(g)(9) WAS ENACTED IN 1996 AND FOR WHICH RECKLESSNESS OR LESS SUFFICES[1]

Alabama: Ala. Code § 13A-6-22(a)(2) (LexisNexis 2005) ("A person commits the crime of assault in the third degree if * * * [h]e recklessly causes physical injury to another person."); *id.* § 13A-2-2(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Alaska: Alaska Stat. § 11.41.230(a)(1) (2014) ("A person commits the crime of assault in the fourth degree if, * * * that person recklessly causes physical injury to another person."); *id.* § 11.81.900(a)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Arizona: Ariz. Rev. Stat. Ann. § 13-1203(A)(1) (2010) ("A person commits assault by * * * [i]ntentionally, knowingly or recklessly causing any physical injury to another person."); *id.* § 13-105(10)(c) (Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *id.* § 13-105(9)(c) (1996) (same, but renumbered).

Arkansas: Ark. Code. Ann. § 5-13-203(a)(2) (2013) ("A person commits battery in the third degree if * * * [t]he person recklessly causes physical injury

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[1] The statutes in this appendix are cited to the current version. Pertinent statutory changes following Section 922(g)(9)'s 1996 enactment are noted.

to another person."); *id.* § 5-2-202(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Colorado: Colo. Rev. Stat. § 18-3-204(1)(a) (2015) ("A person commits the crime of assault in the third degree if * * * [t]he person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon."); *id.* § 18-1-501(8) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Connecticut: Conn. Gen. Stat. Ann. § 53a-61(a)(2) (West 2012) ("A person is guilty of assault in the third degree when * * * he recklessly causes serious physical injury to another person."); *id.* § 53a-3(13) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Delaware: Del. Code Ann. tit. 11, § 611(1) (2007) ("A person is guilty of assault in the third degree when * * * [t]he person intentionally or recklessly causes physical injury to another person."); *id.* § 601(a) ("A person is guilty of offensive touching when the person: (1) [i]ntentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person; or (2) [i]ntentionally strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is thereby likely to cause offense or alarm to such other person."); *id.* § 231(e) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

District of Columbia: D.C. Code § 22-404(a)(1) (LexisNexis Supp. 2015) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."); *id.* § 22-404(a)(1) (LexisNexis 1996) (fine amount amended); *Vines* v. *United States*, 70 A.3d 1170, 1180 (D.C. 2013) ("[R]eckless conduct * * * is enough to establish the intent to convict [a defendant] of simple assault."); *Tarpeh* v. *United States*, 62 A.3d 1266, 1270 (D.C. 2013) ("[A] 'person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and *unjustified* risk that the material element exists or will result from his conduct.'") (quoting Model Penal Code § 2.02(2)(c) (1985)); *Mahaise* v. *United States*, 722 A.2d 29, 30 (D.C. 1998) ("A battery is any unconsented touching of another person."); *Comber* v. *United States*, 584 A.2d 26, 50 (D.C. 1990) ("[S]imple assault * * * is designed to protect not only against physical *injury*, but against all forms of offensive touching.").

Hawaii: Haw. Rev. Stat. Ann. § 707-712(1)(a) (LexisNexis 2007) ("A person commits the offense of assault in the third degree if the person * * * [i]ntentionally, knowingly, or recklessly causes bodily injury to another person.").

Kansas: Kan. Stat. Ann. § 21-5413(a)(1) (Supp. 2013) ("Battery is * * * [k]nowingly or recklessly causing bodily harm to another person."); *id.* § 21-3412(a)(1) (1996) ("Battery is * * * [i]ntentionally or recklessly causing bodily harm to another person."); *id.* § 21-5202(j) (Supp. 2013) (defining recklessly to include conscious disregard of a substantial and unjusti-

fiable risk); *id.* § 21-3201(c) (1996) (previously providing that "[r]eckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger").

Kentucky: Ky. Rev. Stat. Ann. § 508.030(1)(b) (LexisNexis 2014) ("A person is guilty of assault in the fourth degree when: (a) [h]e intentionally or wantonly causes physical injury to another person; or (b) [w]ith recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."); *id.* § 501.020(4) ("A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207(1) (2006) ("A person is guilty of assault if * * * [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person."); *id.* § 35(3) (Supp. 2015) (defining recklessly to include conscious disregard of a risk that attendant circumstances exist or that the conduct will cause a result).

Maryland: Md. Code Ann. Crim. Law § 3-203(a) (LexisNexis Supp. 2015) ("A person may not commit an assault."); *id.* § 3-201(b) (LexisNexis 2012) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Johnson* v. *State*, 115 A.3d 668, 674 (Md. Ct. Spec. App.) ("Assault is causing offensive physical contact to another person" that "was the re-

sult of an intentional or reckless act of the defendant and was not accidental." (citation omitted)), cert. denied, 122 A.3d 975 (Md. 2015) (Tbl.); accord, *e.g.*, *United States* v. *Royal*, 731 F.3d 333, 341 (4th Cir. 2013), cert. denied, 134 S. Ct. 1777 (2014); *Elias* v. *State*, 661 A.2d 702, 709 (Md. 1995) ("[A] criminal battery is committed, in accordance with the prevailing view if the contact was the result of [the defendant's] recklessness or criminal negligence." The "test is whether the [defendant's] misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe." (citations omitted)); *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991) (pre-codification) ("Battery, another common law offense, is the unlawful application of force to the person of another.").

Massachusetts: Mass. Ann. Laws ch. 265, § 13A(a) (LexisNexis 2010) ("Whoever commits an assault or an assault and battery upon another shall be punished."); *id.* § 13A(b); *Commonwealth* v. *Porro*, 939 N.E.2d 1157, 1162 (Mass. 2010) ("A reckless assault and battery is committed when an individual engages in reckless conduct that results in a touching producing physical injury to another person; an unconsented touching is not sufficient."); *Commonwealth* v. *Walker*, 812 N.E.2d 262, 269-270 (Mass. 2004) ("Wanton or reckless conduct * * * is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another. Even if a particular defendant is so stupid or so heedless that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless

conduct if an ordinary normal person under the same circumstances would have realized the gravity of the danger." (citation, brackets, and ellipses omitted)).

Mississippi: Miss. Code Ann. § 97-3-7(1)(a)(i) (West Supp. 2015) ("A person is guilty of simple assault if he * * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 97-3-7(1)(a) (West 1996) (same, but renumbered); cf. *Nix* v. *State*, 763 So. 2d 896, 900 (Miss. Ct. App. 2000) ("Reckless driving occurs when the driver commits conscious acts which a driver knows *or should know* would create an unreasonable risk of injury or damage." (emphasis added)); *Coleman* v. *State*, 45 So. 2d 240, 241 (Miss. 1950) ("[C]ulpable negligence should be defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof.").

Missouri: Mo. Ann. Stat. § 565.070.1(1) (West Supp. 2015) ("A person commits the crime of assault in the third degree if * * * [t]he person attempts to cause or recklessly causes physical injury to another person."); *id.* § 565.070.1(1) (West 1996) (same, but with male pronoun); *id.* § 562.016(4) (West Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Montana: Mont. Code Ann. § 45-5-201(1) (2015) ("A person commits the offense of assault if the person * * * (a) purposely or knowingly causes bodily injury to another" or "(b) negligently causes bodily injury to another with a weapon."); see *id.* § 45-2-101(43) (2015) ("[A] person acts negligently with respect to a result or to a circumstance described by a

statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 'Gross deviation' means a deviation that is considerably greater than lack of ordinary care."); *id.* § 45-2-101(42) (1996) (same, but renumbered).

Nebraska: Neb. Rev. Stat. Ann. § 28-310(1)(a) (LexisNexis 2015) ("A person commits the offense of assault in the third degree if he * * * [i]ntentionally, knowingly, or recklessly causes bodily injury to another person."); *id.* § 28-109(19) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *State* v. *Hoffman*, 416 N.W.2d 231, 237 (Neb. 1987) ("A reckless act involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.").

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-a(I)(b) (LexisNexis 2015) ("A person is guilty of simple assault if he * * * [r]ecklessly causes bodily injury to another."); *id.* § 626:2(II)(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

New Jersey: N.J. Stat. Ann. § 2C:12-1(a)(1) (West 2015) ("A person is guilty of assault if he * * * [a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 2C:2-2(b)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

New York: N.Y. Penal Law § 120.00(2) (McKinney 2009) ("A person is guilty of assault in the third degree when * * * [h]e recklessly causes physical injury to another person."); *id.* § 15.05(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

North Carolina: N.C. Gen. Stat. § 14-33(a) (2013) ("Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor."); *State* v. *Coffey*, 259 S.E.2d 356, 357 (N.C. Ct. App. 1979) ("[I]ntent is an essential element of the crime of assault, including an assault with an automobile, but intent may be implied from culpable or criminal negligence."); *State* v. *Thompson*, 219 S.E.2d 566, 568 (N.C. Ct. App. 1975) ("A battery is the unlawful application of force to the person of another by the aggressor himself or by some substance which he puts in motion.").

North Dakota: N.D. Cent. Code § 12.1-17-01(1)(a) and (b) (2012) ("A person is guilty of an offense if that person * * * [w]illfully causes bodily injury to another human being; or * * * [n]egligently causes bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury."); *id.* § 12.1-02-02(1)(e) (1996) ("[A]

person engages in conduct * * * '[w]illfully' if he engages in the conduct intentionally, knowingly, or recklessly."); *id.* § 12.1-02-02(1)(c) (2009) (defining recklessly to include "conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks").

Ohio: Ohio Rev. Code Ann. § 2903.13(B) (LexisNexis 2014) ("No person shall recklessly cause serious physical harm to another or to another's unborn."); *id.* § 2903.13(B) (LexisNexis 1996); *id.* § 2901.22(C) (LexisNexis Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *id.* § 2901.22(C) committee's cmt. (1974) ("A person is said to be reckless under the section when, without caring about the consequences, he obstinately disregards a known and significant possibility that his conduct is likely to cause a certain result or be of a certain nature, or that certain circumstances are likely to exist."); *Roszman* v. *Sammett*, 269 N.E.2d 420, 423 (Ohio 1971) ("Such proof must be of a nature that shows all absence of care or an absolute perverse indifference to the safety of others, knowing of a dangerous situation, yet failing to use ordinary care to avoid injury to others.").

Oregon: Or. Rev. Stat. § 163.160(1)(a) (2013) ("A person commits the crime of assault in the fourth degree if the person * * * [i]ntentionally, knowingly or recklessly causes physical injury to another."); *id.* § 161.085(9) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2701(a)(1) (West 2015) ("[A] person is guilty of assault if he * * * attempts to cause or intentionally, knowingly or reck-

lessly causes bodily injury to another."); *id.* § 302(b)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

South Carolina: S.C. Code Ann. § 16-3-600(D)(1) (2015) ("A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing."); *id.* § 16-3-600(E)(1) ("A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so."); see *United States* v. *McFalls*, 592 F.3d 707, 716 (6th Cir. 2010) (finding that South Carolina's "common-law crime" of assault and battery of a high and aggravated nature "applies not only to intentional conduct, but also to reckless conduct"); *State* v. *Sussewell*, 146 S.E. 697, 698 (S.C. 1929) (approving of jury instructions stating, "[t]he state must prove beyond a reasonable doubt gross carelessness or recklessness on the part of the defendant").

South Dakota: S.D. Codified Laws § 22-18-1(2) and (3) (Supp. 2015) ("Any person who * * * "[r]ecklessly causes bodily injury to another" or "[n]egligently causes bodily injury to another with a dangerous weapon * * * is guilty of simple assault."); *id.* § 22-1-2(1)(d) (defining recklessly to include "conscious and unjustifiable disregard of a substantial risk that the

offender's conduct may cause a certain result or may be of a certain nature").

Tennessee: Tenn. Code Ann. § 39-13-101(a)(1) (2014) ("A person commits assault who * * * [i]ntentionally, knowingly or recklessly causes bodily injury to another."); *id.* § 39-11-302(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Texas: Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2015) ("A person commits an offense if the person * * * intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse."); see *id.* § 6.03(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Utah: Utah Code Ann. § 76-5-102(1)(b) (LexisNexis Supp. 2015) ("Assault is * * * an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another."); *State* v. *Bird*, 345 P.3d 1141, 1147 (Utah 2015). ("[I]ntent, knowledge, or recklessness must 'be found to establish criminal responsibility' in the context of assault." (citation omitted) (citing Utah Code Ann. § 76-2-102) (LexisNexis 2012)); see also Utah Code Ann. § 76-5-109(3)(b) (LexisNexis Supp. 2015) ("Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of" a misdemeanor if the offense is "done recklessly."); *id.* at § 76-2-103(3) (LexisNexis 2012) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Vermont: Vt. Stat. Ann. tit. 13, § 1023(a)(1) (2009) ("A person is guilty of simple assault if he or she * * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 1023(a)(1) (1996); *State* v. *Brooks*, 658 A.2d 22, 26 (Vt. 1995) (defining recklessly in accordance with Model Penal Code § 2.02(c) (1985), to include conscious disregard of a substantial and unjustifiable risk).

Virginia: Va. Code Ann. § 18.2-57(A) (Supp. 2015) ("Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor."); *id.* § 18.2-57 (1996) ("Any person who shall commit a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor."); see *Gnadt* v. *Commonwealth*, 497 S.E.2d 887, 888 (Va. Ct. App. 1998) ("An assault and battery is an unlawful touching of another. It is not necessary that the touching result in injury to the person. Whether a touching is a battery depends on the intent of the actor, not on the force applied." (citing *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927))); *Trent* v. *Commonwealth*, No. 1844-03-2, 2004 WL 1243037, at *1 (Va. Ct. App. June 8, 2004) (unpublished) ("[I]f the act was done with reckless and wanton disregard for the lives and safety of others, the law would impute to the defendant an intent to do bodily harm and he would be guilty of assault and battery.") (brackets in original) (quoting *Banovitch* v. *Commonwealth*, 83 S.E.2d 369, 374-375 (Va. 1954)); see, *e.g.*, *Holloway* v. *Commonwealth*, 696 S.E.2d 247, 254 (Va. Ct. App. 2010) ("[T]he required mental state may be inferred from the commission of a reckless act.") (citing *Davis* v. *Commonwealth*, 143 S.E. 641, 643 (Va. 1928)); *Davis*, 143 S.E. at 643 ("[A]n intention to injure * * * may be inferred in law from the con-

sequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional.").

Washington: Wash. Rev. Code Ann. § 9A.36.041(1) (West 2015) ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."); see *id.* § 9A.36.031(1)(d) and (f) (felony) ("A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree * * * [w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm" or "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering."); *id.* § 9A.08.010(1)(d) (defining "criminal negligence" to be where a person "fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation").

Wyoming: Wyo. Stat. Ann. § 6-2-501(b) (2015) ("A person is guilty of battery if he intentionally, knowingly or recklessly causes bodily injury to another person by use of physical force."); *id.* § 6-2-501(b) (1996) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another."); *id.* § 6-1-104(a)(ix) (2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

APPENDIX C

STATE MISDEMEANOR DOMESTIC VIOLENCE STATUTES REQUIRING RECKLESSNESS OR LESS

Statutes In Effect When Section 922(g)(9) Was Enacted[1]

Arkansas: Ark. Code Ann. § 5-26-305(a)(2) (Supp. 2015) ("A person commits domestic battering in the third degree if * * * [t]he person recklessly causes physical injury to a family or household member."); *id.* § 5-26-303(a)(2) (1996) (same, but renumbered).

Hawaii: Haw. Rev. Stat. Ann. § 709-906(1) (LexisNexis Supp. 2015) ("It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member."); *State* v. *Eastman*, 913 P.2d 57, 66 (Haw. 1996) ("[T]he prosecution must prove that a defendant acted intentionally, knowingly, or recklessly before he or she may be convicted of the offense proscribed in [Section] 709–906(1).").

Kentucky: Ky. Rev. Stat. Ann. § 508.032(1) (LexisNexis 2014) ("If a person commits a third or subsequent offense of assault in the fourth degree under [Ky. Rev. Stat. Ann. §] 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in [Ky. Rev. Stat. Ann. §] 403.720, then the

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[1] The statutes in this appendix are cited to the current version. Pertinent statutory changes following Section 922(g)(9)'s 1996 enactment are noted.

person may be convicted of a Class D felony."); *id.* § 508.032(1) (LexisNexis 1996); see App. B, *supra*, (defining fourth-degree assault under Ky. Rev. Stat. Ann. § 508.030(1)(b) (LexisNexis 2014), to include reckless causation of physical injury by means of a dangerous weapon).

Montana: Mont. Code Ann. § 45-5-206(1)(b) (2015) ("A person commits the offense of partner or family member assault if the person * * * negligently causes bodily injury to a partner or family member with a weapon.").

Ohio: Ohio Rev. Code Ann. § 2919.25(B) (LexisNexis 2014) ("No person shall recklessly cause serious physical harm to a family or household member.").

South Carolina: S.C. Code Ann. § 16-25-20(A)(1) (Supp. 2015) ("It is unlawful to * * * cause physical harm or injury to a person's own household member."); *id.* § 16-25-20(1) (1996); *id.* § 16-25-20(C) and (D) (Supp. 2015) (denoting interplay between assault and battery and lesser-included violations of subsection (A)); see App. B, *supra* (defining assault under S.C. Code Ann. § 16-3-600(D)(1) (Supp. 2015) and citing decisions holding that the mental state for assault may include reckless conduct).

Vermont: Vt. Stat. Ann. tit. 13, § 1042 (2009) ("Any person who attempts to cause or wilfully or recklessly causes bodily injury to a family or household member; or wilfully causes a family or household member to fear imminent serious bodily injury shall be imprisoned not more than 18 months or fined not more than $5,000.00, or both."); *id.* § 1042 (1996) (not more than one year).

Virginia: Va. Code Ann. § 18.2-57.2(A) (2014) ("Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor."); see App. B, *supra* (defining assault and battery under Va. Code Ann. § 18.2-57(A) (Supp. 2015), and citing decisions holding that the offense may be committed recklessly).

Later-Enacted Statutes

Alabama: Ala. Code § 13A-6-132(a) (Supp. 2014) ("A person commits domestic violence in the third degree if the person commits * * * the crime of assault in the third degree pursuant to Section 13A-6-22 * * * and the victim is a current or former spouse, parent, child, any person with whom the defendant has a child in common, a present or former household member, or a person who has or had a dating or engagement relationship with the defendant."); *id.* § 13A-6-22(a)(2) (2005) ("A person commits the crime of assault in the third degree if, * * * [h]e recklessly causes physical injury to another person.").

Kansas: Kan. Stat. Ann. § 21-5414(a)(1) (Supp. 2013) ("Domestic battery is, * * * [k]nowingly or recklessly causing bodily harm by a family or household member against a family or household member.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1) (Supp. 2015) ("A person is guilty of domestic violence assault if * * * [t]he person violates [Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006),] and the victim is a family or household member."); see App. B, *supra* (citing Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006), which may be committed recklessly).

Mississippi: Miss. Code. Ann. § 97-3-7(3)(a)(i) and (ii) (West Supp. 2015) ("When the offense is committed against" a family or household member, "a person is guilty of simple domestic violence who * * * [a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another," or "[n]egligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.").

Missouri: Mo. Ann. Rev. Stat. § 565.074.1 (West Supp. 2015) ("A person commits the crime of domestic assault in the third degree if the act involves a family or household member * * * and: (1) [t]he person attempts to cause or recklessly causes physical injury to such family or household member; or (2) [w]ith criminal negligence the person causes physical injury to such family or household member by means of a deadly weapon or dangerous instrument."); see also *id.* § 565.070.4 ("A person who has pled guilty to or been found guilty of the crime of assault in the third degree more than two times against any family or household member * * * is guilty of a class D felony for the third or any subsequent commission of the crime of assault in the third degree when a class A misdemeanor.").

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-b(I)(b) and (c) (LexisNexis Supp. 2015) ("A person is guilty of domestic violence * * * against a family or household member or intimate partner," if the person "[r]ecklessly causes bodily injury * * * by use of physical force" or "[n]egligently causes bodily injury to another by means of a deadly weapon.").

North Dakota: N.D. Cent. Code § 12.1-17-01(2)(b) (2012) (simple assault becomes "a class A misdemeanor for a second or subsequent offense," as opposed to a class B misdemeanor, "when the victim is an actor's family or household member"); see App. B, *supra* (defining assault to include "willful"—*i.e.*, intentional, knowing, or reckless—causation of bodily injury).

Tennessee: Tenn. Code Ann. § 39-13-111(b) (2014) ("A person commits domestic assault who commits an assault as defined in [Tenn. Code Ann.] § 39-13-101 against a domestic abuse victim."); *id.* § 39-13-101(a)(1) ("A person commits assault who * * * [i]ntentionally, knowingly or recklessly causes bodily injury to another.").

Utah: Utah Code Ann. § 77-36-1(4)(b) (LexisNexis Supp. 2015) (defining "[d]omestic violence" as an "assault, as described in [Utah Code Ann. §] 76-5-102" "by one cohabitant against another"); *id.* § 77-36-1.1(2) (enhancing the penalties for misdemeanor "domestic violence" assault); see *id.* § 76-5-109(3)(b) ("Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of" a misdemeanor if the offense is "done recklessly."); see App. B, *supra* (defining assault under Utah Code Ann. § 76-5-102(1)(b) as including reckless conduct).

No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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ARGUMENT

I. THE PHRASE "USE . . . OF PHYSICAL FORCE" EXCLUDES RECKLESS CONDUCT.

A. The Common-Law Of Battery And This Court's Decision In *Castleman* Preclude Reckless Misdemeanors From Qualifying As § 922(g)(9) Predicate Offenses.

The government agrees with petitioners that *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), "'dictates that the common-law definition of battery must be used to interpret the phrase 'use * * * of physical force' in 18 U.S.C. § 921(a)(33)(A).'" U.S. Br. 16 (quoting Pet'rs Br. at 13). And it agrees that this Court said in *Johnson* v. *United States* that the "common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another," 559 U.S. 133, 139 (2010) (emphasis added). But the government dismisses the Court's description of common-law battery as dicta that is inconsistent with "[m]ultiple sources" that supposedly establish "that common-law battery proscribed reckless conduct." U.S. Br. 17–18 & n.3. The government's contention is wrong.

1. The government acknowledges "Blackstone's oft-cited description of battery as '[t]he least touching of another's person willfully, or in anger,'" but responds that "willfully" does not necessarily mean intentionally. U.S. Br. 20–22. "Willful" acts, the government notes, may in some circumstances include "'at least inexcusable carelessness'" as well as those that are "malicious, evil, or corrupt." *Id.* (quoting *Black's Law Dictionary* 1834 and Pet'rs Br. 16 n.6). That argument is a diversion with no merit.

To be sure, the "word 'willfully' is variously defined in legal parlance," but in the context of common-law battery it means "'designedly,' 'intentionally' or 'perversely.'" *Lynch* v. *Commonwealth*, 109 S.E. 427, 428 (Va. 1921); see also, *e.g.*, *State* v. *Rand*, 161 A.2d 852, 853 (Me. 1960) (to be guilty of assault and battery, one must "unlawfully strike, hit, touch or do any violence to another, however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence" (citation omitted)); *People* v. *Hale*, 1 N.Y.Cr. 533, 534 (3d Dep't 1883) (crime of assault and battery "necessarily involves a criminal intent, an intent to commit an act of violence upon another, by way of injury and insult, one or both").

2. None of the other "[m]ultiple sources" cited in the government's brief support the government's contrary view that all forms of "common-law battery proscribed reckless conduct." U.S. Br. 17–18. Most of the government's sources do not even purport to be describing the elements of battery at *common-law*. *Id.* (quoting Model Penal Code § 211.1 comment (n. 62) (1980) discussing differences in "whether reckless injuring could be prosecuted under then-prevailing battery *statutes*" (emphasis added)); 6A C.J.S. *Assault* § 85 (2004) (discussing contemporary standards for criminal battery without distinguishing between common-law and statutes); *Black's Law Dictionary* (10th ed. 2014) (citing Wayne R. LaFave & Austin W. Scott Jr., *Criminal Law* § 7.15 at 685 (2d ed. 1986), which likewise presents current law without distinguishing between common-law and state statutes based on the Model Penal Code); Rollin M. Perkins, *Non-Homicide Offense Against the Person*, 26 B.U. L. Rev. 119, 126 (1946) (same, for law of criminal battery as it existed in 1946). Rather, these

sources confirm that criminal liability based on "recklessness" is often a product of legislative enactments.

Indeed, there "do not seem to have been any American common-law prosecutions for reckless battery, or cases even discussing the question, until 1855." Livingston Hall, *Assault and Battery by the Reckless Motorist*, 31 J. Crim. L. & Criminology 133, 138-39 (1940). Thereafter, the common-law developed a conception of "reckless" battery for situations in which a defendant intentionally engaged in conduct, usually involving guns or automobiles, that was so likely to cause serious injury that the jury was permitted to presume that was his intent based on the "principle that every one is presumed to intend the natural and probable consequence of his own act." *Id.* at 142 (quoting *State* v. *Sloanaker*, 1 Houst. (Del.) 62 (1858) (approving instruction that the jury could presume the defendant intended to shoot someone if it found that he intentionally fired a gun into the crowd or at the carriage of the prosecuting witness)); see also 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 60, at 32-33 (rev. 6th ed. 1877) (reckless shooting of victim)); *Commonwealth* v. *Hawkins*, 32 N.E. 862 (Mass. 1893) (same).

3. In any event, the concept of criminal battery based on recklessness never extended at common-law to offensive touching that did not result in physical injury. See, e.g., *Commonwealth* v. *Bruno*, 487 N.E.2d 1366, 1369 (Mass. 1986) (there must by "proof of a physical injury" to sustain conviction for assault and battery under "the theory of reckless conduct causing physical injury"); Hall, *supra*, at 137 (same). Tellingly, the authorities cited by the government regarding reckless conduct batteries *solely* involve physical injury cases. See U.S. Br. at 17–20. And the

cited cases involving offensive contact were based on deliberately offensive and intentional conduct—not reckless conduct. See *United States* v. *Delis*, 558 F.3d 177, 184 (2d Cir. 2009) (finding "the intent to commit an offensive touching" sufficient to support a § 113(a)(5) assault); *United States* v. *Bayes*, 210 F.3d 64, 69 (1st Cir. 2000) (finding the intent to injure not required but sufficient to show "deliberately offensive" contact where the defendant had no "valid reason" for doing so). A common-law battery involving offensive physical contact required an intent to offend as well as to touch. See, *e.g.*, *Hale*, 1 N.Y. Cr. at 535 (the "jury found the defendant not guilty of a criminal assault; that is, they found that the defendant took hold of [the victim's] arm, but with no criminal intent.").

4. This Court held in *Castleman* that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in §921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" 134 S. Ct. at 1410. In doing so, *Castleman rejected* physical injury as the standard of force for § 921(a)(33)(A). *Castleman* thus underscores that *intentional* application of unlawful force—the *mens rea* required for common-law battery based on offensive touching—is the touchstone for "use . . . of physical force" in § 921(a)(33)(A). See *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (when Congress incorporates common-law concepts, it "adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" (quoting *Morissette* v. *United States*, 342 U.S. 246, 236 (1952))).

In *Castleman*, the government itself stated that the "way the common-law described [battery] is it included direct force. It included indirect force. It

included any time that the aggressor *intentionally* set something in motion that caused force to be used; in other words, directed something to act according to the . . . individual's will." Oral Argument Tr. at 13, *United States* v. *Castleman*, No. 12-1371 (S. Ct. Jan. 15, 2014) (emphasis added). Similarly, in *Castleman*, the government represented that twenty-eight states and the District of Columbia have adopted the common-law definition of offensive contact battery. *Id.* at 20. Twenty-three of those states have codified offensive physical contact crimes.[1] Of those twenty-three states, twenty limit offensive physical contact battery to intentional conduct.[2] The only jurisdiction with a statute specifically proscribing reckless offensive physical contact is Maine.[3]

5. The government is wrong to say that the Maine statutes under which petitioners were convicted, as interpreted by the Maine Supreme Court in *State* v. *Gantnier*, require intentional contact with the victim and permit criminal liability only when the person is "reckless as to the resulting harm *i.e.*, the

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[1] Five states and the District of Columbia simply incorporate the common-law definition. *See* D.C. Code § 22-404 (a)(1); Md. Code Ann. § 3-203 (a); Mass. Gen. Laws ch. 265, § 13A; N.C. Gen. Stat. § 14-33; 11 R.I. Gen. Laws § 11-5-3; and Va. Code Ann. § 18-2-57A.

[2] *See* Alaska Stat. § 11.61.120 (a)(5); Ariz. Rev. Stat. § 13-1203 (A)(3); Cal. Penal Code § 242; Del. Code Ann. tit. 11, § 601; Fla. Stat. § 784.03; Haw. Rev. Stat. § 707-712 (1)(a); Idaho Code § 18-903 (B); Ill. Comp. Stat. 720-5/12-3 / 12-3; Ind. Code § 35-42-2-1; Iowa Code § 708.1; Mo. Rev. Stat.§ 565.070; Nev. Rev. Stat. § 200.481; N.H. Rev. Stat. Ann. § 631:2-a; N.M. Stat. Ann. § 30-3-4; Okla. Stat. tit. 21 § 21-642; Or. Rev. Stat. § 166.065; Pa. Cons. Stat. § 2709; Tenn. Code Ann. § 39-13-101; Tex. Penal Code § 22.01; and Wyo. Stat. Ann. § 6-2-501.

[3] *See* Me. Rev. Stat. tit. 17-A, § 207(1)(A).

offensiveness of the contact." U.S. Br. 25. Rather, that court vacated the defendant's conviction because its review of the record led it to conclude that the jury could find that he "did *recklessly touch* the victim and the touching was offensive" even though "it was not [his] purpose to engage in offensive or sexual contact." *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (emphasis added). Contrary to the government's assertion, *Gantnier* did not separate the mental element associated with the result from the mental element associated with the act.

6. Finally, using the *mens rea* associated with offensive contact batteries comports with the idea that "domestic violence" can include non-violent conduct, as long as that conduct is intended to subject one partner to the other's control. See *Castleman*, 134 S. Ct. at 1412. Nowhere does the government address the definition of "domestic violence" as including the concept of control, by intention or design, in its brief. Only petitioners' submission offers a limiting principle of intentionality that is consistent with the holding and reasoning of *Castleman*, the full body of the common-law of battery, and the plain language of the Lautenberg Amendment.

B. The Text Of The Statute Forecloses The Government's Interpretation.

Even if there were doubt as to the requisite *mens rea* for battery at common-law as identified in *Castleman*, the language of the statutory definition of "misdemeanor crime of domestic violence" would foreclose the government's reading. The word "use" in "use . . . of physical force" connotes an *active employment* of force. As this Court explained in *Castleman* itself, "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made

the user's instrument." 134 S. Ct. at 1415 (internal quotation marks omitted). To "*use*" something—whether "force," a household appliance, or an illegal drug—is to "convert" that thing "to one's service," *i.e.*, to "carry out a purpose or action" by employing it. *Smith* v. *United States*, 508 U.S. 223, 228–29 (1993) (quoting *Webster's New International Dictionary* 2806 (2d ed. 1950) and *Black's Law Dictionary* 1541 (6th ed. 1990)). A person makes force his "instrument" by intentionally deploying it, *not* by disregarding a risk that an undesired result might come to pass.

Without disputing petitioners' textual argument on the merits, the government provides a series of justifications for ignoring what a plain reading of the text requires. None of these justifications has merit

1. The government argues that the plain meaning of "use" should be ignored because the term "must be interpreted as [a] 'common-law term[] of art' and defined by the background rule of common-law battery". U.S. Br. 27 (quoting *Castleman*, 134 S. Ct. at 1410 (first alteration in original)). But that argument simply reverts to the government's new-found understanding of the common-law definition of battery. Even if that argument has some merit, the most it achieves is to cast confusion on exactly what the common-law meaning was. The principle that Congress "intends to incorporate the well-settled meaning of the common-law terms it uses" does not apply where the term in question did not have a settled meaning at common-law. *Castleman*, 134 S. Ct. at 1410 (quoting *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013)).

2. The government relies on the relationships among the levels of culpability in criminal law to argue that "reckless" and "knowing" conduct bear a

"close kinship" that justifies treating the two interchangeably. U.S. Br. 28. The government is correct, of course, to say that reckless conduct is often treated as "culpable," and also that the default culpability under the Model Penal Code is recklessness. See, *e.g.*, U.S. Br. 31 & n.10. But that is entirely beside the point. The question is not whether recklessness is a culpable mental state under the common-law, in the Model Penal Code, or otherwise. Instead, the question is what the word "use" means. One does not "use" force by disregarding a risk that an unintended result will occur. That unsuccessful proposition ends the inquiry, regardless of whether recklessness is a culpable mental state.

3. The government also attempts to distinguish *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). U.S. Br. 34–37. According to the government, the word "use" in § 921(a)(33)'s definition of "crime of domestic violence" must be interpreted more broadly than the word "use" in 18 U.S.C. § 16's definition of "crime of violence." According to the government, "Congress could have easily" used § 16's definition—as earlier drafts of the Lautenberg Amendment actually did—but instead chose the broader language of § 921(a)(33). *Id.* at 34.

The government's position is both unfair to the Congress that enacted the Lautenberg Amendment and patently wrong. The government's view is that the word "use" is broader in § 921(a)(33) because § 16's definition includes the phrase "against the person or property of another," while § 921(a)(33)'s does not. But as Senator Lautenberg himself explained, this part of the definition was dropped from the Lautenberg Amendment because it made the definition "too broad." See Statement of Sen. Lautenberg, 142 Cong. Rec. S11876, S11877 (daily ed.

Sept. 30, 1996) (explaining that the enacted version included "a new definition of the crimes for which the gun ban will be imposed" because some had "argued that the term crime of violence was *too broad*" (emphasis added)). It makes little sense to suggest that eliminating crimes against "property"—and thus limiting § 921(a)(33) to those against a person—somehow broadened the statute rather than narrowed it. The government thus paradoxically relies on a narrowing amendment to justify its unduly broad reading of the text.

4. The Court in *Castleman* did not hesitate to rely on *Leocal* to understand the term "use" in § 921(a)(33). Interpreting the Lautenberg Amendment, *Castleman* explained that "use" conveys the idea that the thing used "has been made the user's instrument." 134 S. Ct. at 1415 (citation omitted). It also looked to *Leocal* for the proposition that "'use' of force must entail 'a higher degree of intent than negligent or merely accidental conduct.'" *Id.* (quoting *Leocal*, 543 U.S. at 9); see also *id.* at 1414 n.8 (noting that *Leocal* reserved the question presented in this case, and grouping together citations to cases under both § 16 and § 921(a)(33)). That reliance was well-founded. Section 16 uses almost identical language as, and provided the model for, § 921(a)(33). *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). It thus makes sense that both statutes would use "use" in the same way, which happens also to be the plain and ordinary meaning of the word. And because the ordinary meaning of "use" requires active employment, it makes no difference in

the final analysis whether the Court chooses to rely on *Leocal* or not.

II. POLICY CONSIDERATIONS DO NOT WARRANT DEPARTING FROM THE COMMON-LAW AND PLAIN LANGUAGE OF THE STATUTE.

1. The government contends that interpreting the Lautenberg Amendment to apply only to misdemeanants who are convicted of crimes more culpable than reckless conduct would render § 922(g)(9) a "practical nullity" because some jurisdictions include reckless causation of bodily injury within their statutory definitions of assault. U.S. Br. 38. A ruling in petitioners' favor would do no such thing.

The government argues that many state prosecutors charge misdemeanors in the generic, and that, as a result, the federal government may not be able to produce adequate documents to charge a § 922(g)(9) predicate even where the conduct clearly warrants it. However, this argument ignores prosecutorial practices—such as occurred in *Castleman*—where a state statute proscribes intentional, knowing, or reckless conduct, but the charging document limits the offense to intentional and knowing conduct. "[T]he 'modified categorical approach' that [this Court] ha[s] approved . . . permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents" prepared by the prosecutor. *Johnson*, 559 U.S. at 144 (citation omitted).

The Maine assault statute at issue in this case is illustrative. As the First Circuit recognized, Maine's assault statute is divisible—it sets out six possible

variations of assault, ranging from intentional causation of bodily injury to reckless causation of offensive physical contact. Me. Stat. Ann. tit. 17-A §§ 207(1)(A), 207-A(1)(A); *United States* v. *Voisine*, 778 F.3d 176, 179–80 (1st Cir. 2015) ("Where, as here, the predicate statute is 'divisible' into crimes with alternative sets of elements, [a court] may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the 'modified categorical approach.'" (citing *Castleman*, 134 S. Ct. at 1414)). Of the other jurisdictions criminalizing reckless assault, the strong majority follow a similar approach, such that their assault statutes likely are divisible as to the *mens rea* element.

If this Court were to declare that prosecutors must plead and prove intentional and knowing conduct for a misdemeanor conviction to qualify as a § 922(g)(9) predicate, then prosecutors could follow that direction. The Court has previously acknowledged this charging discretion in an analogous context, noting in *Johnson* that "the Government has in the past obtained convictions under the Armed Career Criminal Act" by relying on documents that established particular variants of predicate state law crimes rather than general violations of the statutes. 559 U.S. at 144–45 (citing *United States* v. *Simms*, 441 F.3d 313, 316–17 (4th Cir. 2006) (Maryland battery), *United States* v. *Robledo-Leyva*, 307 F. App'x 859, 862 (5th Cir. 2009) (Florida battery), *United States* v. *Luque-Barahona*, 272 F. App'x 521, 524–25 (7th Cir. 2008) (same)). And on the one hand, putting the responsibility on prosecutors to plead the requisite offense with enough specificity to bring a defendant within the reach of § 922(g)(9) also would

reign in the over-breadth created by two common, but blunt, tools used to combat domestic violence—mandatory arrest and mandatory prosecution laws.[4] On the other hand, to construe § 921(a)(33)(A) to include reckless conduct (against clear statutory language to the contrary) because a prosecutor in the first instance could not prove a required element (namely, intentional or knowing conduct) would institutionalize the very violations of due process that petitioners noted in their opening brief. Pet'rs Br. at 28–29.

2. As established in petitioners' Opening Brief, the First Circuit's reliance on the discretion of law enforcement and prosecutors as a safeguard in limiting reckless conduct offenses only to those intended to be covered by § 922(g)(9), *Voisine*, 778 F.3d at 185, was misplaced both as a policy matter and legally. The government offers no response to this criticism of the decision below. Instead, it attempts a misdirection, noting that this Court "considered and rejected the view 'that Congress * * * meant to narrow the scope of the statute to convictions based on especially severe conduct'". U.S. Br. at 46 (quoting *Castleman*, 134 S. Ct. at 1416). That argument misses the mark, because an interpretation of § 922(g)(9) that includes *all* reckless misdemeanors will include many such misdemeanors that do not "subject one intimate

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[4] For a discussion of the unintended adverse effects of the criminal justice response to domestic violence, including an increase in female arrest rate and an increase in intimate-partner homicides in jurisdictions with mandatory arrest laws, *see* Pet'rs Br. 27–28 and n. 10. The government's brief is notably silent on this subject.

partner to the other's control" in any meaningful way. *Castleman*, 134 S. Ct. at 1412.[5]

3. The government and *amici*'s other policy arguments similarly are overstated. As this Court recognized in *Castleman*, "domestic violence" is a term of art encompassing acts that might not be considered violence in other contexts—including, as the examples given by the Court, "pushing, grabbing, shoving, slapping, and hitting." *Castleman*, 134 S. Ct. at 1411-12. Significantly, these examples all involve active, intentional "uses" of force and are a far cry from reckless misdemeanors. [6]

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[5] One example is the conduct of a battered woman in protecting or defending herself or her children—conduct which, due to mandatory arrest and no-drop prosecution policies, may lead to a conviction even where the defendant might have a valid defense. *See* Susan Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice and Service Providers Respond*, *in* 7 Violence Against Women 1339, 1339–40 (2001).

[6] *Amicus*'s argument pertaining to evidence of voluntary intoxication in negating intent is emblematic of the overstatement in the briefs of *amici*. *See Amici* Br. Brady Center et al. at 18–21, *Voisine* v. *United States*, No. 14-10154 (S. Ct. Jan. 26, 2016). *Amicus* contends that, because a defendant may sometimes use evidence of voluntary intoxication to attempt to negate the *mens rea* of intent or knowingness (but not recklessness), petitioners' position would "fail to restrict the access to guns of a broad category of intoxicated domestic abusers." *Id.* at 21. But neither Maine law nor any other State's law provides that voluntary intoxication is an automatic, complete defense to intentional or knowing crimes; indeed, some states do not permit voluntary intoxication to negate any mental state at all. *See, e.g.*, Del. Code Ann. tit. 11, § 421; Fla. Stat. § 775.051; Mo. Rev. Stat. § 562.076; Mont. Code Ann. § 45-2-203; Ohio Rev. Code § 2901.21; Tex. Penal Code § 8.04. A prosecutor remains free to charge intent or knowingness, and can still establish those mental states even when the defendant was intoxicated.

Published examples of reckless offensive physical contact cases are few and far between because few jurisdictions make such conduct a crime—in fact, Maine is alone in proscribing it by statute. And despite the First Circuit's assertion to the contrary, such conduct is prosecuted. See *Bailey* v. *State*, No. CR-01-036, 2003 WL 21958211 (Me. Super. Ct. July 28, 2003) (plea colloquy to an assault against an intimate partner reflected only recklessly-caused offensive physical contact); see also *State* v. *Patterson*, 851 A.2d 521 (Me. 2004) (involving conduct not intended as insulting, but resulting in offensive physical contact). Courts and prosecutors routinely distinguish between reckless and intentional acts in the context of offensive physical contact and elsewhere, including in determining whether a prior offense qualifies as a predicate for purposes of the Armed Career Criminal Act.

The government's reference to difficulties of enforcement through the National Instant Criminal Background Check System ("NICS") also is unavailing. See U.S. Br. at 42–43. As a threshold matter, ease of administration of the criminal justice system cannot be a ground for interpreting § 921(a)(33)(A) more expansively than the language that Congress enacted. Cf., *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 253 (1952) (refusing to read an intent element out of a criminal statute to ease the government's path to conviction).

In any event, many federal jurisdictions do not define "use . . . of physical force" as including reckless conduct. See *Castleman*, 134 S. Ct. at 1414 n.8. In addition, the Federal Bureau of Investigation ("FBI") already flags prior federal and state convictions that may qualify as prohibitions and must review appeals

by persons incorrectly denied or delayed.[7] Thus adoption of petitioners suggested construction of § 921(a)(33)(A) would not significantly burden the procedures that the FBI currently follows.

III. THE RULE OF LENITY AND THE DOCTRINE OF CONSTITUTIONAL DOUBT ALSO COUNSEL IN FAVOR OF PETITIONERS' READING OF "USE . . . OF PHYSICAL FORCE."

1. As petitioners have established, both the common-law of battery and the plain language of the Lautenberg Amendment support the conclusion that the phrase "use . . . of physical force" for purposes of § 922(g)(9) does not extend to reckless conduct. The principal tools of interpretation suggested by petitioners and the government both point in the same direction, indicating that a reckless misdemeanor cannot qualify as a § 922(g)(9) predicate crime.

The government argues that the common-law of battery criminalized reckless conduct. *But* cf. U.S. Br. at 40, *Johnson* v. *United States*, No. 08-6925, (Aug. 2009), ("About half of the States today (as when Section 922(g)(9) was enacted) define the crimes of assault or battery according to the common-law rule: as including both the causation of bodily harm and *intentional causation* of offensive physical contact." (emphasis added)). But even an interpretation of the common-law of battery as sometimes proscribing reckless conduct in a certain subset of cases—those

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[7] *See* Federal Bureau of Investigation, *Reasons NICS Background Checks are Denied or Delayed*, https://www.fbi.gov/about-us/cjis/nics/appeals/nics-appeals-process/reasons-nics-background-checks-are-denied-or-delayed (last visited Feb. 17, 2016).

causing significant bodily injury—cannot outweigh the fact that the words "use . . . of physical force" do not include recklessness in any plain-language reading (an assertion with which the government never seriously disagrees). At best, the government's arguments give rise to ambiguity in the statute. The rule of lenity demands that such ambiguity be resolved in petitioners' favor.

The policies undergirding the rule of lenity apply with particular force in cases like this one, where the difference in interpretations means the difference between a harsh penalty—up to ten years in prison, 18 U.S.C. § 924(a)(2), and a complete, lifetime loss of the constitutional right to possess a firearm—and no penalty whatsoever. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (invoking lenity where the difference between interpretations was the difference between no criminal liability and up to 20 years imprisonment).

2. A weighty problem arises under the doctrine of constitutional doubt. The government fails to address the fact that the cases it cites as rejecting a Second Amendment challenge to § 922(g)(9) arose in cases involving prior convictions for both intentional and violent acts proven to be part of the underlying misdemeanor. U.S. Br. at 49–50. It thus ignores the potential due process problem of whether a person may be deprived of a constitutionally-guaranteed right based on reckless conduct that does not amount to a felony, a question that (as petitioners noted in their Opening Brief) this Court has avoided answering in other contexts. See Pet'rs Br. at 35–36.

The examples of domestic violence provided in the government's brief and those of *amici* either are not pertinent to § 922(g)(9) because either there is no

indication of the statutory basis of a prior conviction, or they are dependent on facts that would constitute a felony if prosecuted in many jurisdictions. See U.S. Br. at 26 (stating that "'[i]f the husband's knife grazes his wife or harms her grievously, it is an assault all the same'" (quoting the First Circuit Opinion in *Voisine*, see J.A. at 24); such conduct would be a felony, see Me. Stat. Ann. tit. 17-A § 208(B)); *Amici* Br. Domestic Violence Legal Empowerment and Appeals Project et al. at 20–21, *Voisine* v. *United States*, No. 14-10154 (S. Ct. Jan. 26, 2016) (citing examples involving "Russian Roulette," "fir[ing] a gun in the house," and holding a gun "up to [the victim] while arguing," all of which would be felonious conduct) (citations omitted)). In providing such examples, the government and its *amici* advocate a definition of "misdemeanor crime of domestic violence" that has no limiting principle and thus runs the risk inherent in statutes defining prior convictions based on conduct rather than elements: that it is overboard and thus potentially void for vagueness. See *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) (finding the residual clause of the Armed Career Criminal statute unconstitutionally vague). This is especially the case because "domestic violence" encompasses non-violent conduct based on the notion of "control." If recklessness means anything, it means a result that was not intended, which in turn *negates* control. For "domestic violence" to serve as a definitional term, it must have some meaning other than conduct of which the government and *amici* disapprove.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit, vacate petitioners' convictions, and remand these cases for proceedings consistent with the exclusion of reckless conduct misdemeanors from the definition of a "misdemeanor crime of domestic violence."

Respectfully submitted,

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No. 14-10154

IN THE
Supreme Court of the United States

STEPHEN VOISINE and WILLIAM ARMSTRONG III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE LAW CENTER TO PREVENT GUN VIOLENCE, THE VIOLENCE POLICY CENTER, AND THE EDUCATIONAL FUND TO STOP GUN VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that firearms are kept out of the hands of dangerous people who pose a significant risk of committing crimes, including an interest in ensuring that 18 U.S.C. § 922(g)(9) and other federal gun laws are properly applied to allow strong government action to prevent gun violence. This Court cited an *amicus* brief filed by the Brady Center in construing Section 922(g)(9) in *United States v. Hayes*, 555 U.S. 415, 427 (2009). The Brady Center also filed an *amicus* brief construing Section 922(g)(9) in *United States v. Castleman*, 134 S. Ct. 1405 (2014). Through its Legal Action Project, the Brady Center has filed *amicus* briefs in numerous other cases involving the constitutionality and interpretation of firearms laws, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The **Educational Fund to Stop Gun Violence** is a non-profit organization that seeks to secure freedom from gun violence through research, strategic engagement, and policy advocacy. The

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

Educational Fund has filed *amicus* briefs in numerous cases involving gun laws. Its affiliated organization, the Coalition to Stop Gun Violence, joined the Brady Center in filing an *amicus* brief in *United States v. Castleman*, 134 S. Ct. 1405 (2014) and also filed an *amicus* brief in *Printz v. United States*, 521 U.S. 898 (1997).

The **Law Center to Prevent Gun Violence** is a non-profit, national law center dedicated to reducing gun violence and the destructive impact it has on communities. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center focuses on providing comprehensive legal expertise to promote smart, effective gun laws. The Law Center has filed *amicus* briefs in many Second Amendment cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and has joined the Brady Center in filing *amicus* briefs in firearm-related cases including *United States v. Castleman*, 134 S. Ct. 1405 (2014) and *United States v. Hayes*, 555 U.S. 415 (2009).

The **Violence Policy Center** is a non-profit organization that works to stop the broad-based public health crisis that is gun violence through research, advocacy, education, and collaboration. The Center joined the Brady Center in filing an *amicus* brief in *United States v. Castleman*, 134 S. Ct. 1405 (2014), and regularly submits and joins *amicus* briefs in cases that involve gun laws.

SUMMARY OF ARGUMENT

Congress enacted the Lautenberg Amendment, codified as 18 U.S.C. § 922(g)(9), to keep guns away from individuals with a domestic violence record because of the threat they present to others, especially their own families. Section 922(g)(9) reaches broadly to prohibit "any person" who has been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). "Misdemeanor crime of domestic violence" is defined to encompass any "misdemeanor" that has as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon," in a domestic setting. 18 U.S.C. § 921(a)(33)(A). The court of appeals correctly held that petitioners' convictions for misdemeanor domestic assault under Maine law for intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact constituted a "misdemeanor crime of domestic violence" under this statute.

Nothing in the text or the legislative history of Section 922(g)(9) supports petitioners' proposed exclusion of all misdemeanor domestic violence convictions that include a *mens rea* of recklessness. The statute was written with broad language in order to capture all those convicted of domestic abuse, including convictions for reckless domestic violence. There is nothing inconsistent with interpreting "use of . . . physical force" to include reckless infliction of harm, especially in the context of domestic violence.

Domestic abuse will often involve reckless conduct, whether because the abuser is intoxicated, acting in the heat of an argument, or emotionally unstable. Reckless assaults in the domestic violence context are not isolated incidents between strangers, but—as with domestic violence generally—are likely to repeat and escalate over time. Granting access to guns to domestic abusers who have recklessly assaulted their intimate partners or family members creates the same risk that future domestic disputes will turn fatal as granting that access to abusers who have acted intentionally. Construing Section 922(g)(9) to encompass reckless domestic abuse is therefore consistent with Congress' intent to mitigate that risk.

The special attention Congress paid with the Lautenberg Amendment to domestic abusers and their propensity for future harms is also well supported by social science. Social science research confirms the dangerous correlation between domestic abusers—including those who act recklessly—and access to firearms in light of the tendency for domestic violence to repeat and escalate.

Adopting petitioners' interpretation of Section 922(g)(9) risks exempting domestic abusers who act recklessly under the influence of drugs or alcohol. In Maine, as in many states, self-induced intoxication is not a defense for crimes with a *mens rea* of recklessness, although it may be used in defense for specific intent crimes. In light of the dangerous combination of substance abuse, domestic violence, and firearms, it is implausible that Congress would

have intended to exempt such conduct from Section 922(g)(9).

Furthermore, petitioners' interpretation would have the perverse effect of rendering Section 922(g)(9) inapplicable to a substantial majority of state misdemeanor assault and battery laws that include recklessness as an element. Such a result would frustrate Congress' clear intent to broaden the reach of the Gun Control Act to domestic abusers prosecuted under generally applicable state misdemeanors. Even domestic abusers who act intentionally would be exempt as a categorical matter from Section 922(g)(9) if they, as many do, plead to the generic offense.

Congress intended the Lautenberg Amendment to effectuate a "zero tolerance" policy against domestic abusers possessing firearms. Carving out a substantial number of domestic abusers who pose a danger to their partners and families from the reach of Section 922(g)(9) conflicts with Congress' clear intent and frustrates the manifest purpose for which the statute was enacted.

ARGUMENT

I. The Text and Legislative History of Section 922(g)(9) Demonstrate That Congress Intended to Prevent Convicted Reckless Domestic Abuse Misdemeanants From Possessing Firearms.

A. The Statutory Text Does Not Support Excluding Reckless Domestic Abuse.

The Lautenberg Amendment does not specify a required, or minimum, *mens rea* for a "misdemeanor crime of domestic violence." The only language petitioners point to in support of a heightened *mens rea* requirement is the "use of . . . physical force" language in Section 921(a)(33)(A). But this phrase, which was added to the bill as an "apparently last-minute insertion," *United States v. Hayes*, 555 U.S. 415, 428 (2009), does not by its terms require a particular *mens rea*.

This language was added to exclude property crimes from the definition of "misdemeanor crime of domestic violence," not to impose a heightened *mens rea* requirement. *See* 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg) (explaining that this language prevents Section 922(g)(9) from applying to someone convicted of "cutting up a credit card with a pair of scissors"); *cf.* 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" (emphasis added)).

This Court held in *Castleman* that the "use . . . of physical force" in Section 921(a)(33)(A) incorporates the "common-law meaning of 'force'." *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014). Because domestic abusers are "routinely prosecuted under generally applicable assault or battery laws," the Court explained that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411. Because common law battery proscribes reckless conduct, petitioners' interpretation is inconsistent with *Castleman*. *See* Resp. Br. 16–23; 2 Wayne R. LaFave, *Substantive Criminal Law*, § 16.2(c)(2), at 557 (2d ed. 2003) (LaFave); Model Penal Code § 211.1 comment (n.62) (1980) (While "[t]here was some difference of opinion in prior law as to whether reckless injuring could be prosecuted under then-prevailing battery statutes," "[m]ost courts held that it could").

An ordinary meaning analysis also confirms that a "use of physical force" can be reckless or intentional. The fact that a domestic abuser acts recklessly rather than with a pre-meditated, specific intent to cause bodily injury does not make the conduct any less of a use of force. For example, a domestic abuser who throws a lamp across the room that grazes or hits his spouse can be said to have acted recklessly. Even if he did not intend to injure or even touch his partner, the physical act of throwing the lamp was intentional. Similarly, an abuser who shakes his partner in the heat of an argument to emphasize a point might be deemed to have acted recklessly if he did not purposefully

intend his touching to be offensive. But his conduct clearly involves a use of force within the meaning of the statute.

Such an interpretation is also consistent with *Castleman*'s description of typical acts of misdemeanor domestic violence as including "pushing, grabbing, shoving, slapping, and hitting," or a "squeeze of the arm [that] causes a bruise." 134 S. Ct. at 1412 (citation and internal quotation marks omitted). An abuser could commit these acts recklessly as to the infliction of bodily injury or offense, especially if intoxicated or acting in the heat of an argument. It is highly unlikely that Congress would have intended to exclude these familiar forms of domestic abuse from Section 922(g)(9).

Even if some level of volitional conduct were required, it would be satisfied in light of the definition of "reckless" under the Maine statute. Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person *consciously* disregards a risk that the person's conduct will cause such a result." Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(A) (emphasis added). The statute refers to a "disregard of a risk, when viewed in light of the nature and *purpose* of the person's conduct and the circumstances known to the person," that "involve[s] a *gross deviation* from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C) (emphases added).

Contrary to petitioners' suggestion, merely accidental or negligent conduct will not be captured

under the Maine statute or under similar state assault and battery statutes.

In fact, it is hard to think of a reckless misdemeanor domestic violence conviction meeting that statutory definition which is so minor and unthreatening that Congress would not have intended to include it within the broad reach of Section 922(g)(9). Petitioners fail to offer any such examples, nor do they contend that the facts underlying their own convictions did not involve the "use of physical force." Because misdemeanors by their nature are "minor" offenses, allowing convictions based on recklessness to qualify as predicate offenses under Section 922(g)(9) is entirely consistent with the purpose of the statute.

Moreover, to exempt reckless conduct from "crimes of domestic violence" would ignore the unique context of domestic violence in which seemingly minor offenses repeat and escalate over time. Even where a domestic abuser may lack the specific intent to inflict immediate physical harm, reckless behavior is often part of a larger cycle of intentional intimidation, coercion, and abuse. Recognizing the unique context of domestic violence, this Court declined to extend the same interpretation of "use . . . of physical force" in 18 U.S.C. § 16(a) to Section 922(g)(9). *See Castleman*, 134 S. Ct. at 1410–11. The Court noted that Congress adopted a definition of "misdemeanor crime of violence" that was, according to the sponsor of the Lautenberg Amendment, "probably broader" than the definition of "crime of violence" in Section 16. *Id.* at 1416; 142 Cong. Rec. 26,675.

B. Congress Intended to Prohibit All Persons Convicted of Domestic Violence Misdemeanors—Including For Reckless Domestic Abuse—From Possessing Firearms.

The lack of any textual support for a heightened *mens rea* requirement is further supported by the legislative history confirming that Congress intended Section 922(g)(9) to reach broadly to *all* misdemeanor domestic violence offenses, including convictions that encompass reckless conduct. Congress enacted the Lautenberg Amendment to *close* a "dangerous loophole," that allowed domestic abusers convicted of misdemeanors to possess firearms. 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg). To exempt a substantial segment of misdemeanor domestic violence convictions would contravene clear legislative intent and frustrate the manifest purpose of the statute.

Until the mid-1990s, the Gun Control Act of 1968 prohibited convicted felons but not misdemeanants from possessing firearms. *See Hayes*, 555 U.S. at 418. However, Congress subsequently became concerned that the felon-in-possession laws were inadequate to protect victims of domestic violence from the risk posed by armed domestic abusers.

In 1994, Congress extended the firearm prohibition to any person "who is subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner . . . or

child." 18 U.S.C. § 922(g)(8). This addition was the result of three competing bills offered in 1993 as amendments to an Omnibus Crime Bill. *See* S. 1570, 103d Cong. (1993) (proposed by Senator Paul Wellstone); H.R. 3301, 103d Cong. (1993) (proposed by Representative Robert Torricelli); 139 Cong. Rec. 28,509 (1993) (Senator John Chaffee's proposed language of amendment 1169 to S. 1607, the crime bill). The sponsors of these bills emphasized the need to expand the law because of the dangers inherent in the possession of firearms by domestic abusers. *See, e.g.*, 139 Cong. Rec. at 30,578–79 (statement of Sen. Chafee) ("There have been far, far too many dreadful cases in which innocent people . . have been wounded or killed by a former boyfriend or girlfriend, partner, or other intimate using a gun—despite the fact that the attacker was subject to a restraining order.").

In 1996, Congress further extended the existing firearm prohibition to those with a conviction of a "misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Senator Frank Lautenberg of New Jersey proposed the ban on the possession of firearms by domestic violence misdemeanants. Senator Lautenberg and others in Congress recognized that because domestic violence repeats and escalates over time, domestic abuse is especially likely to culminate in homicide or serious bodily injury if the abuser has access to firearms. However, domestic abusers were often convicted under state misdemeanor statutes, not felonies, and therefore "[e]xisting felon-in-possession laws . . . were not keeping firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426.

Senator Frank Lautenberg's bill proposing a misdemeanant possession ban was introduced to "close this dangerous loophole." 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg).

Congress' intent to extend the firearm prohibition beyond felonies to misdemeanors involving domestic violence recognized the unique context of domestic violence. Unlike other crimes, domestic violence by definition involves parties who have an established and ongoing close relationship. Domestic violence is not based on violent acts imposed by a stranger, but commonly arises in the context of reckless behavior by a partner. In a domestic violence setting, reckless conduct is also more likely to recur over time and to escalate into situations that could turn fatal with the presence of guns.

Senator Lautenberg explained the ongoing nature of most relationships involving domestic violence that made it likely that abuse would continue to occur again and again:

> These crimes involve people who have a history together and perhaps share a home or a child. These are not violent acts between strangers, and they don't arise from a chance meeting. Even after a separation, the individuals involved, often by necessity, have a continuing relationship of some sort, either custody of children or common property ownership.

142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg).

The tendency for domestic violence to escalate poses a unique risk unlike other types of violence even at the level of recklessness. As this Court recognized, "[d]omestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408. The new law, in Senator Lautenberg's view, would "save the life" of the "ordinary American woman" caught in this escalating cycle of domestic abuse. 142 Cong. Rec. at 26,674 (statement of Sen. Lautenberg).

Nothing in the legislative history of the Lautenberg Amendment discusses a heightened *mens rea* requirement or a desire to exempt reckless misdemeanor crimes of domestic violence. To the contrary, Congress contemplated that domestic violence often occurs when abusers act recklessly, in the heat of the argument, almost without realizing what they are doing.

Senator Lautenberg explained that in many domestic violence situations, the woman's "generally . . . decent, law-abiding" husband occasionally "*loses his temper*" when "the stresses of life build," sometimes even "*los[ing] control*" and lashing out at his family. 142 Cong. Rec. at 26,674 (statement of Sen. Lautenberg) (emphases added). In the future, Senator Lautenberg foresaw, this husband would "*lose his cool* at work, or with the boys," "get into another argument with his wife." *Id.* Next, things will "escalate" and "*get out of control*," and "*almost without knowing what he is doing*, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer." *Id.*

(emphases added). This impulsive and careless behavior will change their world "in an instant" and "this woman, this loving mother, this ordinary American, will die or be severely wounded." *Id.*

Aware of the reality that escalation makes *any* level of domestic violence misdemeanant especially dangerous, Congress did not limit its firearms ban only to those offenders that demonstrated a heightened *mens rea*. Rather, Section 922(g)(9) is meant to embrace "seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances." *United States v. Voisine*, 778 F.3d 176, 184 (1st Cir. 2015). As Senator Wellstone explained, "[i]f you are not responsible enough to keep from doing harm to your spouse or your children, then society does not deem you responsible enough to have a gun." 139 Cong. Rec. at 28,360 (statement of Sen. Wellstone). A domestic abuser who acts recklessly in harming his family or partner is as irresponsible with a firearm as one who acts knowingly.

Although it "may sound like a tough policy," Senator Lautenberg explained that "when it comes to domestic violence it is time to get tough." 142 Cong. Rec. at 22,986. "There is no margin of error when it comes to domestic abuse and guns," because "[a] firearm in the hands of an abuser all too often means death." *Id.*

II. Social Science Studies Confirm That the Risk of Serious Injury and Fatality Increases Substantially When Domestic Abusers Have Access to Firearms.

Social science research confirms Congress' conclusion that *all* individuals convicted of domestic assault misdemeanors should be prohibited from owning firearms. Convictions for misdemeanor domestic violence, including under assault statutes that encompass recklessness conduct, are highly correlated with future violence against intimate partners and family members.

Each year, "[t]his country witnesses more than a million acts of domestic violence, and hundreds of deaths of domestic violence." *Castleman*, 134 S. Ct. at 1408; Jennifer L. Truman & Lynn Langton, BUREAU OF JUSTICE STATISTICS, *Criminal Victimization*, 2014. More than one in three women in the United States have experienced rape, physical violence, or stalking by an intimate partner in their lifetime. *See* National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, Center for Disease Control and Prevention (November 2011). *See also* Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS (2000).

When domestic abusers have access to firearms, the effects of domestic violence are intensified, often fatally. In households with a history of domestic violence, the presence of a gun

makes a homicide 5-fold more likely than where there is no gun. *See* Johns Hopkins Center for Gun Policy and Research, *Intimate Partner Violence and Firearms* (July 2015). In Maine, Petitioners' home state, nearly half of all homicides in 2012 and 2013 resulted from domestic violence, and more than half of these were committed with firearms. *See* MAINE DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *Building Bridges Towards Safety and Accountability to End Domestic Violence Homicide* (April 2014). Nationally, two-thirds of women killed in domestic violence homicides are murdered with guns. *See* F. Stephen Bridges et al., *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide*, 19 CRIMINAL JUSTICE POLICY REVIEW 1 (2008). Of the 1,530 homicides of women in the United States in 2013 in which the relationship between the killer and the victim could be identified, 1,438 (94%) of the victims were murdered by a male they knew. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2013 Homicide Data* (September 2015).

The dangerous correlation between domestic violence and access to firearms is equally present for reckless domestic violence as it is for knowing and intentional behavior. Reckless abuse can escalate to more serious, including deadly, violence in the same or future incidents, especially where a gun is present. More than 65 percent of women who are killed by their intimate partners had previously been victims of domestic abuse. *See* Lawrence A. Greenfield et al., *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriend, and Girlfriends*, U.S. Department of

Justice Report No.: NCJ-167237 (1998). Many domestic violence incidents also occur in the context of heated arguments, in which an abuser may act impulsively and recklessly. In 2013, 280 women were shot and killed during the course of an argument. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2013 Homicide Data* (September 2015).

Guns are used by batterers to kill but also to intimidate and control. In one study, almost two thirds (64.5%) of women in emergency battered women's shelters in California who lived in a home with a gun reported that their partner had used a gun to scare, threaten, or harm her. Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 92 AM. J. OF PUB. HEALTH 8, 1414 (August 2004). As the authors of this study concluded, "[f]irearms are more common in the households of battered women and their partners than among the general population, which is cause for concern, given the lethality of firearms. In addition, firearms can be used to intimidate a woman into doing something or allowing something to be done to her—such coercion would not necessarily result in physical injury or at least not in a gunshot wound." *Id.* at 1416.

Whether reckless or intentional, "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S. at 427.

III. The Relationship Between Intoxication and Domestic Violence Illustrates the Prevalence of "Reckless" Behavior in Domestic Violence as Addressed by Section 922(g)(9).

The prevalence of domestic abusers who act recklessly due to drug and alcohol abuse illuminates the dangerous implications of petitioners' argument that reckless conduct should be carved out of the reach of Section 922(g)(9).

In Maine, as in many states, defendants may present evidence of voluntary intoxication as a defense to specific intent crimes, but not for crimes with a *mens rea* of recklessness. *See* Me. Rev. Stat. tit. 17-A § 37.1-2 ("evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind," except "when recklessness establishes an element of the offense"). As a result, domestic violence which would otherwise appear intentional may be charged or pled as reckless if the abuser was voluntarily intoxicated at the time of the abuse. By incorporating a *mens rea* of recklessness, the Maine generic battery statute (and similar state statutes) ensure that intoxicated domestic abusers are held liable for their conduct.

Intoxication and substance abuse is deeply embedded in many domestic violence incidents and relationships. Alcohol abuse is strongly associated with the perpetration and victimization of domestic violence, including nonfatal and fatal intimate partner violence. *See* Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in* REDUCING GUN

VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS at 68 (Daniel W. Webster and Jon S. Vernick, eds. 2013) (citing Phyllis Sharps et al., *The Role of Alcohol in Intimate Partner Femicide*, 10 AM. J. OF ADDICTIONS 2 (2001)). In one study, half of the men in court-referred batterer intervention programs who were surveyed reported that they had an alcohol-related diagnosis; a third of the same group reported symptoms consistent with a drug-related diagnosis. *See* Gregory Stuart et al., *Substance Abuse and Relationship Violence Among Men Court-Referred to Batterers' Intervention Programs*, 24 SUBSTANCE ABUSE 2 (June 2003). In another study, more than 45% of inmates in prison or jail who were convicted of a crime of violence against an intimate partner were drinking or using drugs at the time of the offense. *See* BUREAU OF JUSTICE STATISTICS FACTBOOK, *Violence by Intimates* (March 1998). Another found that around 60% of men in batterer intervention programs had substance use disorders—and that roughly the same proportion of men in substance use disorder treatment programs had committed acts of domestic violence against their partners. *See* Christine Timko et al., *Addressing Substance Abuse and Violence in Substance Use Disorder Treatment and Batterer Intervention Programs*, 37 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POLICY 7 (2012).

Those who work with domestic abusers agree that alcohol and drugs play an integral role in enabling many abusers. James J. Collins and Donna L. Spencer surveyed the staff of substance abuse treatment programs and domestic violence programs about the connection between substance abuse and

domestic violence. Nearly all of the staff surveyed—94.7% of those working in substance abuse programs and 98.6% of those working in domestic violence programs—responded that alcohol or drug use is used as an excuse by men who assault their partners. An overwhelming majority of the staff—98.5% of the substance abuse program staff and 75.9% of the domestic violence program staff—said that drinking or drug use increases the chances a man will assault his partner. *See* James J. Collins & Donna L. Spencer, *Linkage of Domestic Violence and Substance Abuse Services, Research in Brief, Executive Summary*, U.S. Department of Justice Document No.: 194122 (1999).

The combination of drugs, alcohol, and access to firearms is a particularly deadly combination. In general, individuals who drink in a chronic or acute way and who own guns present a greater risk to themselves and others than their sober counterparts. *See* Garen Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, PREV. MED. (2015). In one study, respondents who owned firearms were more likely than those who did not live in a home with a firearm to engage in binge drinking, drive under the influence of alcohol, and have at least 60 drinks per month. *See* Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS at 69 (Daniel W. Webster and Jon S. Vernick, eds. 2013). Alcohol and controlled substance abuse are important predictors of future risk for violence, including using firearms on others

or oneself. *See* Garen Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, ANNU. REV. PUBLIC HEALTH (2015). Substance use disorders correlate to threatening others with a firearm. *See* Hygiea Casiano et al. *Mental Disorder and Threats Made By Noninstitutionalized People with Weapons in the National Comorbidity Survey Replication*, J. NERV. MENT. DIS. (2008).

When a domestic abuser is acting under the influence of drugs or alcohol, adding a gun to the situation heightens the risk to all involved. In one survey of women in battered women's shelters, of the women who had been threatened by their partner with a gun, 74.5% reported their partner was intoxicated at the time. Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 92 AM. J. OF PUB. HEALTH 8, 1414 (August 2004).

Under petitioners' proposed exclusion of reckless domestic violence, the Lautenberg Amendment would fail to restrict the access to guns of a broad category of intoxicated domestic abusers. Considering the increased risk of serious injury and fatality when drugs and alcohol are combined with firearms, it is implausible that Congress intended to leave a loophole open for domestic abusers with histories of substance abuse.

IV. The Practical Impact of Petitioners' Interpretation Would Exclude a Majority of State Assault and Battery Statutes and Allow Many Domestic Abusers Ready Access to Guns.

In enacting Section 922(g)(9), Congress recognized that "domestic abusers" were "routinely prosecuted under generally applicable assault or battery laws," rather than more serious offenses. *Hayes*, 555 U.S. at 427. *See also* 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("[C]onvictions for domestic violence-related crimes often are for crimes, such as assault . . . ."). To close this "dangerous loophole," Congress intended a qualifying "misdemeanor crime of domestic violence" to include these generally applicable state (and federal) battery and assault laws. *Id.* at 22,986 (statement of Sen. Lautenberg).

Petitioners' interpretation, however, would exempt from Section 922(g)(9) misdemeanor assault or battery offenses from thirty-four states and the District of Columbia that define misdemeanor assault to include reckless conduct. *See* Resp. Br. 34 and App. B. *See also* LaFave § 16.2(c)(2), at 557 ("a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness"); cf. Model Penal Code § 211.1(a)(1985) ("A person is guilty of assault if he . . . attempts to cause or purposefully, knowingly or recklessly causes bodily injury to another."). Petitioners' interpretation would also exclude federal assault crimes, which are interpreted to include recklessness. *See* Resp. Br. 40–41.

At the time of Section 922(g)(9)'s enactment, at least eight States had domestic violence assault provisions that proscribed reckless conduct expressly or by incorporating the State's general assault and battery provision. *Id.* at 39.[2] Nothing in the legislative history suggests that Congress intended to exclude these specific state domestic violence statutes from the scope of Section 922(g)(9).

To carve out such a broad swath of domestic violence offenses would render the Lautenberg Amendment inoperative in a substantial majority of states from the moment of its enactment. This Court has twice declined to render Section 922(g)(9) a "dead letter" by including limitations in the statute that would have made it "ineffectual" at the time of its enactment.

In *Hayes*, the Court rejected a requirement that the predicate misdemeanor identify a domestic relationship as an element of the crime because "construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute . . . would frustrate Congress' manifest purpose, and would lead to the statute being "'a dead letter' in some two-thirds of the States from the very moment of its enactment." 555 U.S. at 426–27. *See also id.* at 427 ("[W]e find it highly improbable that Congress meant to extend § 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers

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[2] Nine states have since added domestic assault and battery provisions that include recklessness. *Id.* at 39; App. C.

prosecuted under laws rendering a domestic relationship an element of the offense.").

In *Castleman*, the Court recognized that "if offensive touching did not constitute 'force' under § 921(a)(33)(A), then § 922(g)(9) would have been ineffectual in at least 10 States—home to nearly thirty percent of the Nation's population—at the time of its enactment." *Castleman*, 134 S. Ct. at 1413. The Court held that Congress would not have intended the statute to be interpreted in a manner that would have "would have rendered § 922(g)(9) inoperative in many States at the time of its enactment." *Id.*

Petitioners' interpretation here would exempt a far greater number of state misdemeanors than the proposed interpretation rejected by this Court in *Castleman*, making it all the more implausible that Congress intended such an absurd result.

Under the categorical approach, the effect of petitioners' interpretation will not only result in exempting incidents of reckless domestic violence, but will also exempt intentional acts of domestic violence where a defendant pleads to the generic offense. The point is well illustrated by the underlying cases of petitioners Voisine and Armstrong.

In June 2003, and again in 2005, Voisine was convicted of misdemeanor assault. *Voisine*, 778 F.3d at 178. His 2003 conviction arose after he slapped his girlfriend, who reported that he was intoxicated at the time. *See* Br. in Opp. at 5 (citing Voisine C.A. App. 33). According to the police report, his

girlfriend told the officer that Voisine was drunk, that he "had slapped her in the face," and that "this was not the first time it happen[ed]." *Id.* Voisine pleaded guilty of simple assault. *Id.* Voisine was arrested in 2009, for shooting a bald eagle with a rifle. *Voisine*, 778 F.3d at 178.

In 2002 and 2008, Armstrong was convicted of misdemeanor assault. *Voisine*, 778 F.3d at 178. In 2008, Armstrong was convicted of misdemeanor assault after an argument escalated between him and wife in which he pushed and then hit his wife "hard." *See United States v. Armstrong*, 706 F.3d 1, 2–3 (1st Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 1759, 188 L. Ed. 2d 590 (2014). In 2010, police searched his house for drug paraphernalia and marijuana and found six guns and ammunition at his house. *Id.*

In both Voisine and Armstrong's cases, the underlying facts involved a knowing or intentional "use of force" against the victim: slapping and shoving.[3] Under the categorical approach, however, courts look to the generic offense, especially where, as here, a defendant's guilty plea tracks the language of the generic assault statute and no facts are admitted into the record. If petitioners' interpretation of Section 922(g)(9) is adopted, all persons convicted under the generic version of the

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[3] To the extent Voisine's intoxication at the time of the assault would render his conduct merely "reckless," that would further support not adopting petitioners' interpretation. *See* Section III, *supra*.

statute—even if the underlying conduct was in fact intentional or knowing—will not be covered by the statute and be able to legally possess firearms.

Congress enacted the Lautenberg Amendment to resolve the problem that domestic violence offenders were not covered by the existing gun control laws because of the realities of charging and pleading practices. To adopt petitioners' proposed limitation would re-open the very loophole Congress intended to close.

Congress intended Section 922(g)(9) to reach broadly to all domestic violence, "no matter how it is labeled"; no "ifs, ands, or buts." *See* 142 Cong. Rec. at 19,415, 22,986 (statements of Senator Lautenberg); *see also* 142 Cong. Rec. at 27,264 (the law "would prevent anyone convicted of *any kind* of domestic violence from owning a gun") (statement of Sen. Dodd) (emphasis added).

Petitioners' attempt to read a heightened *mens rea* requirement into Section 922(g)(9) has no basis in the statutory text and conflicts with the clear legislative intent to include *all* domestic violence offenses. Petitioners' interpretation would also frustrate the manifest purpose of the Lautenberg Amendment by allowing a substantial number of domestic abusers whose reckless behavior poses a significant threat to their partners and families to have ready access to firearms.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be affirmed.

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STEVEN L. VOISINE AND WILLIAM E. ARMSTRONG III,
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UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR CHILD JUSTICE, INC. AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR CHILD JUSTICE, INC. AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

Child Justice, Inc. and The American Professional Society on the Abuse of Children respectfully submit this brief as amici curiae in support of Respondent.

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. Timely notice of intent to file this brief was provided to Petitioner and Respondent. Consent to file was obtained from Respondent, and Petitioner filed a blanket consent with the Court.

Child Justice, Inc. is a national organization that advocates for the safety, dignity, and self-hood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and serve children in cases where child sexual abuse, physical abuse, or domestic violence is present. The organization works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research, and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to threats facing abused, neglected, and at-risk children.

Child Justice has a strong interest in this Court upholding the firearm ban for individuals convicted of domestic violence misdemeanors, including those convictions under statutes that may include a *mens rea* of recklessness. Child Justice has a deep understanding of what happens when irresponsible adults lose control and become violent around their children. Under the Lautenberg Amendment, recklessly violent behavior that results in a conviction for a misdemeanor crime of domestic violence disqualifies a misdemeanant from possessing a firearm for good reason—young lives are at risk.

The American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. As a multidisciplinary group of professionals, APSAC achieves its mission in a number of ways—most notably through expert training and ed-

ucational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles.

APSAC is a 28-year-old organization that has played a central role in developing professional guidelines that address child maltreatment and, as such, is well qualified to inform the Court about the nature of child maltreatment and the ways in which society acts to prevent it. APSAC is submitting this amicus brief to assist the Court in understanding the perspectives of children and impact of domestic violence upon children in their homes.

INTRODUCTION AND SUMMARY OF ARGUMENT

"THE CHILD: He hurt Mommy. (Crying).

THE OPERATOR: Okay. Don't cry. We are going to send the police [. . .]

THE OPERATOR: They are in the back room or the bedroom?

THE CHILD: The back—Oh, my God. (Screaming).

THE OPERATOR: What's the matter?

THE CHILD: (Crying) (Unintelligible)."[2]

This amicus curiae brief aims to shed light on the often invisible victims of domestic violence: children. In a majority of households where domestic violence occurs, children are there watching, waiting, and often fearing for their lives.[3] In these households, chil-

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[2] Transcript of the LISA 911 Tape at 3, 5, http://www.ndsec.org/2013connectionshandouts/Trauma/Lisa%20911%20Transcript.pdf (last visited Jan. 15, 2016). The written excerpt displayed here is an incomplete representation of the experience of this six-year-old child who dialed 911 because her stepfather was beating her mother. For a more complete and accurate understanding of this child's experience, the San Francisco Globe made the audio file available to its readers. *See Little Girl Calls 911 as Her Mother Is Being Beaten by Her Stepfather*, The San Francisco Globe (Dec. 8, 2014), http://sfglobe.com/2014/12/06/little-girl-calls-911-as-her-mother-is-being-beaten-by-her-stepfather/. The audio file is embedded at the bottom of the article. This child, like many others, deserves to be heard.

[3] Lawrence A. Greenfield *et al.*, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouse, Boyfriends, and Girlfriends*, U.S. Dep't of Just., Bureau of Just. Stats. 5 (Mar. 1998), http://bjs.gov/content/pub/pdf/vi.pdf (noting that

dren learn that those who are meant to keep them safe are in fact the most dangerous. And one factor increases that danger more than any other—guns.

Guns and domestic violence are a lethal combination. Congress acknowledged this simple truth when it enacted the Lautenberg Amendment, establishing a "zero tolerance" policy that prevented domestic violence misdemeanants from possessing guns. In the words of its sponsor: "[a]buse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts."[4] It is the "ifs, ands, [and] buts" that Petitioners attempt to write into the Amendment by claiming that the statute somehow allows a domestic violence misdemeanant to possess a gun "if" the crime for which they were prosecuted by law enforcement was "accidental conduct."[5] What we—and Congress—know is that the world of domestic violence is unique. In this world, violent "accidents" do not happen. If you lose your temper, if you lose control, if you are reckless to the point that your behavior "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense[,]"[6] the directive of the statute is clear: you lose your gun.

This is for good reason—too often, young lives are cut short by domestic abusers with guns. Those who survive domestic violence face overwhelming re-

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more than half of female victims of intimate violence live in households with children under the age of 12).

[4] 142 Cong. Rec., S10377-01 (Sept. 12, 1996) (statement of Sen. Lautenberg).

[5] Pet'r's Br. at 10; *see also id.* at 21, 32.

[6] *United States* v. *Castleman*, 134 S. Ct. 1405, 1412 (2014).

percussions, ranging from social and behavioral effects to impaired brain development. Even these repercussions are not the end—children exposed to domestic violence are at increased risk of not only victimization at the hands of an abuser, but also perpetration later in life. Domestic violence turns a child's life upside down, teaching them that everything they learn about love, safety, and family is wrong. The Court should not risk extending such harms in this important case.

ARGUMENT

I. SCIENTIFIC RESEARCH CONFIRMS THAT LETHAL AND, FOR SURVIVORS, LASTING CONSEQUENCES OF DOMESTIC VIOLENCE FOR CHILDREN ARE EXACERBATED WHEN ABUSERS HAVE ACCESS TO GUNS.

A. Children, The All Too Frequent Victims Of Domestic Violence, Face Lethal And Lasting Consequences.

Some of the biggest victims of domestic violence are the smallest: one national survey found that *one in four* children in the United States is exposed to family violence during their lifetimes.[7] An estimated 15.5 million children living in married or cohabitating U.S. households are exposed to domestic vio-

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[7] Sherry Hamby *et al.*, *Children's Exposure to Intimate Partner Violence and Other Family Violence*, U.S. Dep't of Just., Office of Just. Programs 1 (Oct. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf.

lence each year, and roughly seven million of them live in homes where that violence is severe.[8]

Even more frightening, in homes where domestic violence occurs, the children themselves are abused or neglected at a rate 15 times the national average.[9] Indeed, the co-occurrence of child abuse and intimate partner violence is well-documented: studies have shown that in "30% to 60% of families in which either child maltreatment or [intimate partner violence] is occurring, the other form of violence is also being perpetrated."[10] Clearly, possession of firearms by those who violently mistreat their intimate partners puts children at risk as well.

And children are often disproportionately affected by domestic abuse: (1) "relative to the general population, families with documented incidents of domestic violence have a significantly higher number of children in the home, especially children younger than age 5[,]" (2) "research suggests that children in violent homes commonly see, hear, and intervene in

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[8] Renee McDonald *et al.*, *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. of Fam. Psychol. 137, 139 (2006), http://www.ncfm.org/libraryfiles/Children/DV/family-violence-study-may2006.pdf.

[9] *Children Who Witness Domestic Violence*, Children's Defense Fund Ohio 2 (Oct. 2009), http://cdf.childrensdefense.org/site/DocServer/children-who-witness-domestic-violence-ohio.pdf?docID=9961.

[10] Jonathan D. Thackeray *et al.*, *Clinical Report—Intimate Partner Violence: The Role of the Pediatrician*, 125 Pediatrics 1094, 1095 (May 2010), http://pediatrics.aappublications.org/content/pediatrics/125/5/1094.full.pdf.

episodes of marital violence," and (3) "children who witness interparental violence show significantly worse outcomes than those who witness other forms of destructive interparental conflict."[11]

Most tragically, death all too often is the result. An estimated 1,520 children were killed by domestic abusers in 2013.[12] This equates to an average of *four children killed every day* by abuse or neglect.[13] Make no mistake—these are crimes against the most helpless. Ninety percent of children killed during a domestic dispute are under the age of ten; fifty-six percent are under the age of two.[14]

The import of this data is disturbingly clear: allow individuals who have demonstrated a tendency towards domestic violence access to a firearm, and additional harm or death to children almost certainly will result. Consider just five examples of shootings in the time since the First Circuit ruled in this case:

- On November 20, 2015, a Florida man entered his ex-girlfriend's home, shooting and killing her father and her twin five-month-old daughters before

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[11] Katherine M. Kitzmann *et al.*, *Child Witnesses to Domestic Violence: a Meta-Analytic Review*, 71 J. Consulting and Clinical Psychol. 339, 339, 346 (2003).

[12] Child Welfare Information Gateway, *Child Abuse and Neglect Fatalities 2013: Statistics and Interventions*, Children's Bureau 2 (Apr. 2015), https://www.childwelfare.gov/pubPDFs/fatality.pdf [hereinafter "Child Welfare Information Gateway"].

[13] *Id.*

[14] Sibnath Deb, Children in Agony: A Source Book 7 (Sibnath Deb ed. 2006) (citing Fla. Governor's Task Force on Domestic and Sexual Violence, *Florida Mortality Review Project*, at 51, tbl. 28 (1997)).

turning the gun on himself. The woman, who was shot multiple times but survived the attack, admitted there had been a long history of domestic abuse but was too scared to seek a protective order.[15]

- On August 8, 2015, a Harris County, Texas, man shot and killed his ex-girlfriend, her partner, and her six children. The man had previously been convicted of multiple domestic violence offenses involving the victim, and there was an emergency protective order in place against him.[16]

- On June 16, 2015, a man shot and killed his estranged wife in front of the couple's seven-year-old daughter. A divorce complaint filed by the victim alleged that the man had previously beaten her and pointed a gun at her head.[17]

- On May 29, 2015, a man shot and killed his ex-girlfriend and their one-year-old daughter in Chesterfield County, Virginia. The man had previously pleaded guilty to a domestic assault charge, and an order of protection had been issued against

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[15] *Florida mom recounts grisly triple murder-suicide that she survived*, FoxNews.com (Nov. 29, 2015), http://www.foxnews.com/us/2015/11/29/florida-mom-recounts-grisly-triple-murder-suicide-that-survived.html.

[16] *4 things to know about David Conley, accused of killing 8 inside Texas home*, AJC.com (Aug. 9, 2015, 4:42 PM), http://www.ajc.com/news/news/national/3-things-know-about-david-conley-accused-killing-8/nnGQN/.

[17] MaryAnn Spoto, *Neptune cop had threatened wife with gun before, divorce papers say*, NJ.com (June 17, 2015, 4:35 PM), http://www.nj.com/monmouth/index.ssf/2015/06/slain_wife_accused_nj_cop_of_abuse_and_excessive_p.html.

him after he beat the victim just four months earlier.[18]

• On February 10, 2015, an Indiana man shot and killed his three-year-old daughter and six-year-old son after attacking his wife. The husband had been served with a protective order in February, 2013, after previous incidents of domestic violence.[19]

As these stories and statistics demonstrate, an astounding number of children in the United States are exposed to horrific gun violence or directly and violently targeted by members of their own family. If they survive, children face a litany of consequences that science confirms will follow them throughout their lives.[20]

Specifically, child abuse and neglect "impair, often permanently, the activity of major neuroregulatory systems, with profound and lasting neurobehav-

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[18] Laura French, *Stafford Shaw was due in court for a child support hearing*, WTVR.COM (June 1, 2015, 9:41 PM), http://wtvr.com/2015/06/01/stafford-shaw-was-due-in-court-for-a-child-support-hearing/.

[19] *6-Year-Old Dies, Police Still Investigating Paoli Shooting*, WBIW.com (Feb. 13, 2015, 6:42 AM), http://www.wbiw.com/local/archive/2015/02/6-year-old-fighting-police-still-investigating-paoli-shooting.php.

[20] Notably, children indirectly exposed to domestic violence face some of the same behavioral and emotional problems as children who themselves are physically abused. *See Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF 3 (2006), http://www.unicef.org/media/files/BehindClosedDoors.pdf [hereinafter "Behind Closed Doors"].

ioral consequences."[21] Maltreated children, including those exposed to domestic violence, are at increased risk for depression, suicide attempts, hallucinations, liver disease, chronic obstructive pulmonary disease, coronary artery disease, autoimmune disease, and obesity.[22]

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[21] Robert F. Anda *et al.*, *The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology*, 256 Eur. Archives Psychiatry Clinical Neuroscience 174, 174-75 (2006), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232061/pdf/nihms340170.pdf; *see also* Eamon McCrory *et al.*, *Research Review: The neurobiology and genetics of maltreatment and adversity*, 51 J. Child Psychol. and Psychiatry 1079, 1079 (2010) (finding that early childhood maltreatment is associated with numerous neurobiological deficiencies including "atypical development of the hypothalamic-pituitary-adrenal (HPA) axis stress response, which can predispose to psychiatric vulnerability in adulthood[,]" structural differences in the corpus callosum, and "atypical activation of several brain regions, including decreased activity in the prefrontal cortex").

[22] Vincent J. Felitti & Robert F. Anda, *The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders and Sexual Behavior: Implications for Healthcare*, *in* The Hidden Epidemic: Impact of Early Life Trauma on Health and Disease 79-83 (Ruth A. Lanius, Eric Vermetten, & Clare Pain eds., June 2010), http://www.theannainstitute.org/Lanius.pdf. This data is drawn from the Adverse Childhood Experiences ("ACE") Study, which is collaboration between the Centers for Disease Control and Prevention ("CDC") and Kaiser Permanente's Health Appraisal Clinic in San Diego, CA. This study is the largest ongoing examination of childhood maltreatment and adult health outcomes, routinely examining over 17,000 participants. *Injury Prevention & Control: Division of Violence Prevention*, CDC, http://www.cdc.gov/violenceprevention/acestudy/ (last updated May 13, 2014).

Abused and neglected children are also twice as likely to have poor social skills,[23] have a propensity to struggle academically,[24] and "can literally lose the capacity to form meaningful relationships."[25] Frighteningly, these behavioral challenges include an increased likelihood of violent and aggressive behavior toward others. The Childhood Domestic Violence Association reports that children exposed to domestic violence are seventy-four times more likely to commit violent crimes in the future.[26]

Perhaps the most troubling effect of domestic abuse is this: exposure to parental violence as a child is the strongest predictor of experiencing domestic

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[23] E. Wilson *et al.*, *Child Well-Being Spotlight: Adolescents with a History of Maltreatment Have Unique Service Needs That May Affect Their Transition to Adulthood*, Off. of Plan., Res., and Evaluation, Admin. for Children and Families, U.S. Dep't of Health and Human Servs. 1 (Sept. 18, 2012), http://www.acf.hhs.gov/sites/default/files/opre/youth_spotlight_v7.pdf.

[24] Behind Closed Doors, *supra* note 20, at 3, 7.

[25] Bruce D. Perry, *Supporting Maltreated Children: Countering the Effects of Neglect and Abuse*, 48 Adoption Advocate 1 (June 2012), https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO48.pdf. According to NSCAW data, the majority of adolescents who have experienced child abuse or neglect also are at increased risk for behavioral problems including delinquency, truancy, and substance abuse. *See* E. Wilson et al., *supra* note 23, at 1.

[26] *The Impact*, Childhood Domestic Violence Ass'n, http://cdv.org/the-impact/ (last visited Jan.15, 2016).

violence as an adult.[27] In fact, "adults who were exposed to [intimate partner violence] as children were 6 times more likely to be emotionally abused, 4.8 times more likely to be physically abused, and 2.6 times more likely to be sexually abused than children who were not exposed to [intimate partner violence]."[28]

Social science and medical research has not only identified these far-reaching and long-lasting consequences after years of detailed and extensive study, but scientists have also identified a factor that augments the impact that domestic violence has on a child's life—guns.

B. Guns Augment The Danger Of Domestic Violence For Children.

"Guns [. . .] turn domestic violence into domestic homicide."[29] In homes where domestic violence already exists, the presence of a gun *magnifies the risk of homicide by 600%*.[30] Between 1980 and 2000, sixty to seventy percent of U.S. domestic abuse incidents that resulted in death of an intimate partner in-

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[27] Miriam K. Ehrensaft, *et al.*, *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, 71 J. of Consulting and Clinical Psychol. 741, 749 (2003), http://www.apa.org/pubs/journals/releases/ccp-714741.pdf.

[28] Jonathan D. Thackeray *et al.*, *supra* note 10, at 1095.

[29] *When Men Murder Women: An Analysis of 2012 Homicide Data*, Violence Policy Ctr. 1 (Sept. 2014), http://www.vpc.org/studies/wmmw2014.pdf.

[30] Jacquelyn C. Campbell *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. Just. J. 15, 16 (2003), https://www.ncjrs.gov/pdffiles1/jr000250e.pdf.

volved a firearm.[31] As the Court observed in *Castleman*, "the presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide."[32]

Guns in the hands of domestic abusers are not just lethal weapons—they are also tools used to intimidate and control women and children. "[T]here is growing evidence documenting the role of guns in nonfatal domestic violence."[33] According to researchers from the Harvard School of Public Health, when guns are found in the home, they are used in "hostile gun displays" to intimidate and threaten women and

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[31] Emily F. Rothman *et al.*, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005).

[32] *Castleman*, 134 S. Ct. at 1408. While research in this area has focused on intimate partner homicide rather than the homicide of children, the narratives in Section I stand as horrific examples of what happens when children become involved in a domestic dispute involving a gun. What's more—the effect of a child losing a mother in a domestic dispute cannot be disregarded. Children who lose a parent to domestic homicide are often placed in foster homes or left to be raised by older siblings, receiving little, if any, counseling or support. *See Hennepin Cnty. Domestic Fatality Review Pilot Project* 24 (2002) http://archive.leg.state.mn.us/docs/2009/mandated/090863.pdf (finding that "[t]he Review Team found these children's stories very disturbing since none of the documents it obtained contained any information about additional services that were provided to children or their families once they had been place in new custodial care").

[33] April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers' Access to Guns*, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis 53, 54 (Daniel W. Webster & Jon S. Vernick, eds. 2013), http://home.uchicago.edu/ludwigj/papers/Impact%20of%20Brady%20Act%202013.pdf.

children "more common[ly]" than they are used for self-defense.[34] As one chilling example, an anonymous caller relayed to the National Domestic Violence Hotline that her abuser "threatened [our young] child that he would shoot the entire family, and maybe others."[35] These threats incite terror in the victims, and for good reason: "women who were threatened or assaulted with a gun or other weapon were *20 times more likely* than other women to be murdered."[36]

Attaching a firearm prohibition to the earliest conviction for domestic violence, whether committed recklessly or intentionally, makes sense given that "abuse often starts subtly and gets worse over time."[37] Victims of domestic violence risk a "40% to 80%" probability of repeat violence,[38] and, where previously no injury occurred, there is an 83.7% probability of future injury.[39] Further, a recent study of

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[34] Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home*, 50 Soc. Sci. & Med. 285, 290 (2000).

[35] *Firearms & Domestic Violence*, The Nat'l Domestic Violence Hotline, http://www.thehotline.org/resources/firearms-dv/#tab-id-2 (last visited Jan. 15, 2016).

[36] Jacquelyn C. Campbell *et al.*, *supra* note 30, at 16 (emphasis added).

[37] Mayo Clinic Staff, *Domestic violence against women: Recognize patterns, seek help*, Mayo Clinic (Apr. 12, 2014), http://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/domestic-violence/art-20048397?pg=1.

[38] Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005).

[39] Alex R. Piquero *et al.*, *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization,*

408 murder-suicides revealed that prior domestic violence occurred seventy percent of the time, but only twenty-five percent of those cases resulted in prior domestic violence arrests.[40] Notably, eighty-nine percent of murder-suicides involve a firearm.[41] Add a gun to this cycle, and the escalation turns deadly for women and children.

Even when death does not result, the escalation of domestic violence due to the presence of a gun results in worse outcomes for children. One study, for example, found significantly higher risks of behavioral problems among children whose parents use—or threaten to use—guns or knives during a marital dispute, when compared to children who witness domestic violence not involving weapons.[42] Similarly, children who witness domestic disputes that involve a weapon and result in injuries are more likely to experience post-traumatic stress disorder symptoms.[43]

Escalation, and De-escalation Evidence from the Spouse Assault Replication Program, 121 Pub. Health Rep. 409, 414 (2006).

[40] Bernie Auchter, *Men Who Murder Their Families: What the Research Tells Us* 266 Nat'l Inst. Just. J. 10, 10 (2010), https://www.ncjrs.gov/pdffiles1/nij/230412.pdf.

[41] *American Roulette: Murder-Suicide in the United States*, Violence Policy Center 4 (May 2012), http://www.vpc.org/studies/amroul2012.pdf.

[42] Ernest N. Jouriles *et al.*, *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. Family Psychol. 178, 190-92 (1998).

[43] John Fantuzzo & Rachel Rusco, *Children's Direct Sensory Exposure to Substantiated Domestic Violence Crimes*, 22 Violence & Victims 158, 167 (2007); *see also* James Garbarino *et al.*, *Mitigating the Effects of Gun Violence on Children and Youth*, 12 Children, Youth, and Gun Violence 73, 74 (2002) http://futureofchildren.org/futureofchildren/publications/docs/12

The development of post-traumatic stress and depression in children who live in a household with a gun is a grave concern given that forty-one percent of teen suicides in 2014 were committed with a firearm.[44]

Further, witnessing domestic violence involving weapons increases a child's likelihood of committing a violent offense with a weapon themselves.[45] "Men who reported witnessing threat or use of a weapon in parental violence were more likely than not to have threatened to use or have actually used a weapon against an intimate partner."[46] When a child witnesses a parent use a gun during a domestic dispute, the child learns that adults use guns to get what they want, and the child observes how to use them. With guns, the danger posed by domestic violence

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_02_05.pdf (finding that "a recent study of rural third-through eighth-graders indicated that children exposed to gun violence reported significantly higher levels of [. . .] posttraumatic stress.").

[44] *Teen Homicide, Suicide, and Firearm Deaths*, Child Trends Data Bank 2 (Dec. 2015), http://www.childtrends.org/?indicators=teen-homicide-suicide-and-firearm-deaths.

[45] John Fantuzzo & Rachel Rusco, *supra* note 43, at 180; *see also* Steve Spaccarelli *et al.*, *Exposure to Serious Family Violence Among Incarcerated Boys: Its Association With Violent Offending and Potential Mediating Variables*, 10 Violence and Victims 163, 174 (1995).

[46] Amy R. Murrell *et al.*, *When Parents Model Violence: The Relationship Between Witnessing Weapon Use as a Child and Later Use as an Adult*, 14 Behav. and Soc. Issues 128, 128 (2005), http://www.firstmonday.org/ojs/index.php/bsi/article/viewFile/359/233.

increases exponentially, the consequences worsen, and the cycle of violence continues.[47]

Congress signed the Lautenberg Amendment to keep firearms away from individuals with a demonstrated history of and propensity for domestic violence[48]—and these laws work. Laws prohibiting abusers subject to restraining orders from purchasing firearms result in a statistically significant reduction in rates of homicide of women by their intimate partners.[49] In fact, restricting access to firearms for individuals subject to a domestic violence restraining order reduced intimate partner homicide by 19% and reduced intimate partner homicides committed with guns by 25%.[50] Further, those who

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[47] Even if a mother is able to leave a domestic abuser, the children are often not safe from the offending parent. *See* Joan S. Meier, *Rates At Which Accused And Adjudicated Batterers Receive Sole or Joint Custody*, Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) 4 (Aug. 2013), http://www.dvleap.org/LinkClick.aspx?fileticket=97ddo5pFEso%3D&tabid=1118 (explaining that one study, which examined 38 state court decisions concerning custody and domestic violence, found that "36 of the 38 courts had awarded joint or sole custody to alleged *and adjudicated* batterers"); *see also* Laurie Duker & Judy Whiton, *Circuit Court Protective Order Practices in Domestic Violence Cases: In the Best Interests of the Child?*, Court Watch Montgomery 9 (May 2014), http://mnadv.org/_mnadvWeb/wp-content/uploads/2014/06/FIN.CC-Rept-5.28.14-rev.pdf (documenting that even after finding by clear and convincing evidence that a parent had committed domestic violence, judges in Montgomery County, Maryland ordered unsupervised visits with the offending parent in 70% of cases).

[48] *See* Section II, *infra* at 20.

[49] Zeoli & Frattaroli, *supra* note 33, at 57.

[50] *Id.*

attempted, but were denied, purchase of a firearm were much less likely than those who purchased a firearm to be arrested for a new crime involving guns or violence.[51]

By preventing individuals with a history of domestic violence from owning a gun, the Lautenberg Amendment reduces the likelihood that pervasive domestic violence will escalate to murder. Reversing the First Circuit would permit scores of convicted abusers to arm themselves,[52] placing their children at greater risk of impaired brain development, academic challenges, social maladaptation, future victimization, future criminal behavior, and death.

II. THE PLAIN LANGUAGE OF 18 U.S.C. §§ 922(g)(9) AND 921(a)(33)(A) ENCOMPASS MISDEMEANOR DOMESTIC VIOLENCE CONVICTIONS OBTAINED WITH A *MENS REA* OF RECKLESSNESS.

The language of the Lautenberg Amendment recognizes that the physical, mental, and behavioral harms to child witnesses to domestic violence are no different whether the abuser swung a fist, threw a chair, or fired a gun intentionally or recklessly. Sections 922(g)(9) and 921(a)(33)(A) do not limit the

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[51] Garen J. Wintemute *et al.*, *Effectiveness of Denial of Handgun Purchase by Violence Misdemeanants*, Violence Prevention Res. Program, 41-42 (May 29, 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

[52] *National Instant Criminal Background Check System (NICS) Operations 2014*, U.S. Dep't of Just. Fed. Bureau of Investigation 18 (2014), https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report (stating that from November 30, 1998 to December 31, 2014, 112,925 firearm sales were denied because the purchaser had been convicted of a misdemeanor crime of domestic violence).

prohibition on gun ownership to perpetrators convicted of misdemeanor crimes of domestic violence that were committed intentionally.

This Court has recognized that the Lautenberg Amendment was enacted to "close [a] dangerous loophole in the gun control laws," which previously kept firearms only out of the hands of felons.[53] Because perpetrators of domestic violence generally are convicted of misdemeanors under state assault and battery laws, they were left free to access firearms, and "[f]irearms and domestic strife are a potentially deadly combination."[54] The text of §§ 922(g)(9) and 921(a)(33)(A) can only be understood in the "unique context of domestic violence," which, as explained above, differs in kind and consequence from other types of violence.[55]

Under § 922(g)(9), it is a federal crime for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition."[56] Section 921(a)(33)(A), with exceptions not relevant here, defines a "misdemeanor crime of domestic violence" as an offense that:

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[53] *Castleman*, 134 S. Ct. at 1409 (quoting *United States* v. *Hayes*, 555 U.S. 415, 426 (2009)) (internal quotations omitted).

[54] *Hayes*, 555 U.S. at 427.

[55] *United States* v. *Voisine*, 778 F.3d 176, 180 (1st Cir. 2015), *cert. granted in part*, 136 S. Ct. 386 (2015) (internal citations omitted); *Castleman*, 134 S. Ct. at 1407 (outlining differences between the "use of physical force" as defined in § 921(a)(33)(A) and the force required to commit a "violent felony" under the ACCA).

[56] 18 U.S.C. § 922(g)(9).

> (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force [...] committed by a current or former spouse, parent, or guardian of the victim, or [...] by a person similarly situated to a spouse, parent or guardian of the victim.[57]

The question presented here is whether "reckless" conduct is a "use [. . .] of physical force," a question left open in *Castleman*. Under the categorical approach, the Court must find that a conviction for a misdemeanor crime of domestic violence falls within the scope of 18 U.S.C. §§ 922(g)(9) and 921(a)(33)(A).[58]

There is no *mens rea* requirement in § 922(g)(9). That omission was, no doubt, intentional; Congress chose not to limit § 922(g)(9)'s protections to victims where the perpetrator had been convicted of intentional conduct. As the First Circuit noted in *United States* v. *Booker*, "Congress included a *mens rea* requirement in the immediately preceding section of the legislation that enacted § 922(g)(9),"[59] and had it so intended, could have inserted a *mens rea* requirement in the Lautenberg Amendment. In the absence of an express limitation from Congress, a broader

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[57] 18 U.S.C. § 921(a)(33)(A).

[58] In Maine, a person commits a misdemeanor domestic violence assault when he or she "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact [. . .]" to "a family or household member." Me. Rev. Stat. Ann. tit. 17-A, §§ 207(A)(1), 207-A(1)(A).

[59] 644 F.3d 12, 18 (1st Cir. 2011).

reading of the scope of § 922(g)(9)'s ban on gun ownership is consistent with the goals of the Lautenberg Amendment. It also aligns with the conclusions of extensive research into the dire consequences of introducing guns into the often escalating cycle of domestic violence.

In *Castleman*, this Court held that Congress "incorporated the common-law meaning of 'force'—namely offensive touching" in § 921(a)(33)(A)'s definition of 'misdemeanor crime of domestic violence.'"[60] In other words, "the requirement of 'physical force' is satisfied, for purposes of 922(g)(9), by the degree of force that supports a common-law battery conviction."[61] Petitioners conceded below that "reckless causation of bodily injury is a use of physical force."[62] The degree of force used does not turn on the batterers' level of intent. Whether the perpetrator acted intentionally or with "conscious disregard" for his consequences, the effect on the victim will be the same. The effect on the children witnessing the violence will be the same.

This case provides the Court with the opportunity to clarify that the protections of § 922(g)(9) extend to protect all victims of domestic violence, no "ifs, ands, or buts." Such a holding is consistent with the statutory language and would further the purpose of the Lautenberg Amendment.

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[60] 134 S. Ct. at 1410.

[61] *Id.* at 1413.

[62] *Voisine*, 778 F.3d at 183.

III. Reversing The Appellate Court's Decision Would Be Contrary To Congressional Intent.

Legislative history reflects that the purpose and scope of the Lautenberg Amendment are "simple"—"Wife beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period."[63] The legislative history reflects an understanding that "all too often, the only difference between a battered woman and a dead woman is the presence of a gun."[64]

As explained by the Lautenberg Amendment's sponsor, § 922(g)(9) was meant to "establish a policy of zero tolerance when it [came] to guns and domestic violence."[65] Absent from the legislative history is any discussion of the perpetrator's state of mind. Senator Lautenberg explained that his amendment would "prohibit *any* person convicted of domestic violence from possessing a firearm."[66] This purpose is reflected in the statutory text, which does not impose a *mens rea* requirement, and instead broadly bars gun ownership for those convicted of a "misdemeanor crime of domestic violence." To think that Congress would have intended reckless domestic violence to be an exception to the broad firearm prohibition for do-

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[63] 142 Cong. Rec. 18,544 (July 23, 1996) (statement of Rep. Woolsey).

[64] 142 Cong. Rec. S10377-01 (statement of Sen. Wellstone); *see also id.* ("Domestic violence, no matter how it is labeled, leads to more domestic violence, and guns in the hands of convicted wife beaters leads to death.") (statement of Sen. Lautenberg).

[65] *Id.* (statement of Sen. Lautenberg).

[66] *Id.* (emphasis added).

mestic violence offenders requires feats of imagination, twisting of words, and a deep misunderstanding of America's problem with domestic violence.

Should this Court reverse the decision below, the result would be entirely inconsistent with the text of § 922(g)(9), opening a loophole akin to the one that Congress designed the Lautenberg Amendment to close. Victims of domestic violence—women and their children alike—who happen to live in states whose statutes define a less than intentional form of domestic violence deserve the same protection from lethal recidivism as those who reside elsewhere.[67] Measured in lives lost, the cost of a contrary ruling would be too high.

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[67] *See* Resp't Br. at 38-42 (identifying states whose misdemeanor battery and domestic violence statutes proscribe reckless conduct). Notably, convictions in a majority of cases are the result of a plea bargain, meaning that the defendant ultimately pleads guilty to a charge that is less serious that the charge he would face at trial. *See Steps in a Trial: Plea Bargaining*, American Bar Ass'n, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html (last visited Jan. 25, 2016).

CONCLUSION

For the foregoing reasons, and those offered by the Government, the decision of the First Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, AND FUTURES WITHOUT VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project ("DV LEAP") is committed to combatting domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence, pursuing civil and criminal legal and policy reform efforts on their behalf, and filing *amicus curiae* and party briefs in appellate courts and in this Court.

AEquitas: The Prosecutors' Resource on Violence Against Women ("AEquitas") provides training, research assistance, and resources to improve the investigation and prosecution of crimes of violence against women.

Futures Without Violence ("FUTURES") provides groundbreaking programs, policies, and campaigns to empower individuals and organizations working to end violence against women and children around the world. FUTURES was a driving force behind the passage of the Violence Against Women Act of 1994.

SUMMARY OF ARGUMENT

Amici, three nationally recognized organizations providing advocacy and training, and promoting reform of the criminal and civil law pertaining to domestic violence,

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

are gravely concerned about the devastating impact Petitioners' position would have on the safety of victims of domestic abuse. Petitioners' proposed result would deeply erode the protections of the 1996 amendments to the federal Gun Control Act (the "Lautenberg Amendment"), by allowing many convicted batterers to possess firearms. *Amici* seek to make clear that (1) Petitioners' arguments as to the meaning of the Lautenberg Amendment are incorrect; (2) Petitioners' position would devastate state and federal efforts to keep guns out of the hands of batterers due to the practical realities of state prosecutions; and (3) Petitioners' argument that this Court should narrow the scope of the firearms prohibition because too many minor domestic abuse cases are prosecuted now, completely misstates reality.

First, Petitioners' depiction of how battery[2] has been prosecuted over time is distorted. The common law treatment of battery varied across states and unquestionably includes support for a recklessness *mens rea*. Moreover, both the unsettled nature of the common law's treatment of the *mens rea* for battery, and this Court's decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and *Castleman v. United States*, 134 S. Ct. 1405 (2014), make clear that the common law, while an important starting place, cannot be an outer limit on the meaning of the statute's definition of a "misdemeanor crime of domestic violence" ("MCDV") in 18 U.S.C. § 922(g)(9). Rather, the legislative history indicates that MCDVs were intended to include convictions under contemporary

2. As noted by the Government, "assault" and "battery" are often "used interchangeably" in criminal law. Brief for the United States ("Gov. Br.") at 14 n. 2. *Amici* will do the same.

statutes and that reckless crimes were very much on the sponsors' minds.

Second, the practicalities of state misdemeanor prosecutions mean that the result Petitioners seek would render the Lautenberg Amendment protections largely meaningless in the numerous jurisdictions with "divisible" statutes, which permit conviction under more than one *mens rea* level, because such adjudications rarely produce documentation of the specific *mens rea* for the conviction. As a result, excluding recklessness from the MCDV definition would mean that convicted domestic violence misdemeanants in a substantial number of states would still have access to firearms, despite the Lautenberg Amendment.

Third, contrary to Petitioners' contention, reckless domestic batteries are neither "minor" nor "accidental," and removal of firearms from such perpetrators is not "unjust," but a matter of common sense. Reckless battery involves "conscious disregard" of the risk of harm, and in the domestic violence context, is only a small piece of a larger pattern of highly intentional coercive control. Moreover, many incidents that may appear "minor" in a vacuum are often immediately followed by homicide. Guns provide abusers with an effective tool for terrorizing victims and significantly increase the likelihood of fatal violence.

Finally, there is no factual basis to support Petitioners' claim that too many misdemeanor offenses are "swept" into a criminal justice system that has eliminated discretion in arrests and prosecution. Even today, only a tiny percentage of all domestic violence crimes that occur

result in conviction. Accordingly, this Court should reject Petitioners' efforts to keep guns in the hands of convicted domestic abusers and should hold that the Lautenberg Amendment's definition of an MCDV includes convictions for reckless domestic battery.

ARGUMENT

I. WHILE THE COMMON LAW IS NOT CONTROLLING, IT ALSO SUPPORTS INTERPRETING THE WORD "USE" IN THE PHRASE "USE OF PHYSICAL FORCE" TO INCLUDE A RECKLESSNESS *MENS REA*.

Relying on *Castleman*, Petitioners argue that Congress intended to incorporate "the common-law definition of battery" when adopting the phrase "use of physical force" in the definition of an MCDV and that the common law precluded battery based on recklessness as a *mens rea*. Brief for Petitioners ("Pet. Br.") at 13-17. However, Petitioners overstate the role of the common law in construing Section 922(g)(9), and they misstate the common law view of the *mens rea* for battery.

A. The Common Law Provides a Floor, but not a Ceiling in Defining a Misdemeanor Crime of Domestic Violence.

The Lautenberg Amendment bars individuals convicted of an MCDV from possessing firearms. An MCDV is defined, in pertinent part, as a "misdemeanor under Federal, State, or Tribal law" that "has, as an element, the use or attempted use of physical force..." 18 U.S.C. § 921(33)(A)(i-ii). In *Castleman*, this Court

consulted the common law to answer the question of whether an "offensive touching" battery could be classified as a "use of physical force," despite the fact that relatively little "force" was required for the crime. *Castleman*, 134 S. Ct. at 1410. Concluding that, as a historical matter, the common law's "misdemeanor-specific meaning of 'force'" for the *actus reus* of battery is "satisfied by even the slightest offensive touching," the Court held that an MCDV does indeed include an offensive touching battery. *Id.* at 1410, 1413.

In *Castleman*, the common law was used to *support* an application of the Lautenberg Amendment to a purportedly minor battery of offensive touching, not to limit its application. The Court stated that Congress "incorporated" the common law — a non-exclusive term suggesting the common law was "included" in the definition, but not implying - and certainly not holding - that if the common law fails to answer the question, or if modern state statutes and case law differ from earlier common law, contemporary usages of "misdemeanor" or "use of physical force" would necessarily be excluded from the definition of MCDVs. *See id.* at 1410.

Indeed, this Court has "declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose." *Taylor*, 495 U.S. at 594-95. Here, limiting the statute as Petitioners propose would fly in the face of Congressional intent and the plain language of the statute, which expresses, without doubt, Congressional intent to treat misdemeanor convictions under state, Tribal, or federal law as the predicate offenses for the federal firearm prohibition.

In fact, the remarks of sponsors and other senators when the Lautenberg Amendment was enacted signaled concern about reckless abusive behavior that could cause death or grievous injury when guns are available. *See, e.g.*, 142 CONG. REC. S11872-01 (Sept. 30, 1996) (statement of Sen. Lautenberg) (describing the law's application to scenarios in which domestic arguments "get out of control," "the anger will get physical" and one partner will commit assault "almost without knowing what he is doing"); 142 CONG. REC. S10379 (Sept. 12, 1996) (statement of Sen. Feinstein) (describing concern that guns "might do . . . harm" when domestic "violence get[s] out of hand," "result[ing] in tragedy"). As these remarks illustrate, Congress was concerned not only with intentional injuries, but also with volatile situations that could spiral out of control. *See also United States v. Hayes*, 555 U.S. 415, 426-27 (2009) (the "manifest purpose" of § 922(g)(9) was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife").

Congressional intent with regard to the term "use of physical force" is also clear: As Senator Lautenberg explained, that phrase was inserted in order to ensure that purely property-related crimes, such as "cutting up a credit card with a pair of scissors," would be excluded from the definition of MCDV. 142 CONG. REC. S11872-01. No reference was made to the common law meaning of the phrase "use of physical force." *Id.*

Indeed, Senator Lautenberg spoke at length about the importance of identifying predicate offenses that fit the MCDV definition, without once mentioning *mens rea*:

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, *it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law... I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.* After all, for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death.

142 CONG. REC. S11872-01, (Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added). Despite this in-depth focus on how conviction records would need to be explained to identify MCDVs, neither Senator Lautenberg, nor anyone else offering remarks about the amendment, expressed any concern about identifying the *mens rea* of a predicate offense; it is therefore apparent that excluding state convictions for reckless acts was neither considered nor intended.

Thus, the most one can say about the role of the common law in interpreting the definition of an MCDV and the term "use of physical force," is that the common law provides a floor, but not a ceiling or limit on the crimes included as predicate offenses. Neither *Castleman*, the language of the statute, nor anything in the legislative

history suggests that Congress sought to *limit* the scope of application of the Lautenberg Amendment to only those crimes that were recognized at common law.

B. The Common Law is Diverse, but Supports a *Mens Rea* of Recklessness for Battery.

To whatever extent the common law informs the interpretation of "use of physical force," it provides support for including reckless crimes, although it is far from uniform.

Petitioners assert that there is a well-settled common-law definition of battery that "makes clear that the crime could be committed only with the mental state of intentional or knowing conduct." Pet. Br. at 15. However, Petitioners acknowledge that "Blackstone described battery as '[t]he least touching of another's person willfully, or in anger.'" Pet. Br. at 15-16 (quoting 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1768)). Blackstone's distinction between "willfulness" and "anger" could not be a clearer indication that something less than purpose or knowledge was contemplated. Indeed, the reference to "anger" captures the classic reckless crime, in which the perpetrator is enraged, and behaves recklessly in a manner which is dangerous, but not with a specific intent to harm. *See, e.g.*, statements of Sens. Lautenberg and Feinstein, *supra* at 7. *See also* Gov. Br. at 16-22 (citing multiple early sources).

Moreover, here is what members of Congress would have found if they had looked to neighboring states to investigate whether there was a "common law definition of battery" (Pet. Br. at 13) before enacting § 922(g)(9):

If Congress had looked nearby to Maryland, the common law of Maryland defines battery to include offensive physical contact that is the result of a reckless act. *See Nicolas v. State*, 44 A.3d 396, 406-07 (Md. 2012) (noting that statute codified the common law meaning, which included offensive physical contact that was the result of an intentional or reckless act of the defendant).

If Congress looked across the Potomac to Virginia, the common law of Virginia defines battery to include conduct "which showed a reckless and wanton disregard for human life and safety." *See Davis v. Commonwealth*, 143 S.E. 641, 643 (Va. 1928). Virginia courts also capture the Blackstone formulation, holding that a battery includes any touching "in rudeness or in anger" or "willfully or in anger." *See Lynch v. Commonwealth*, 109 S.E. 427, 428 (Va. 1921).[3]

Petitioners, in identifying some examples in which common-law battery required more than recklessness, have at most shown that the common law is varied. Pet. Br. at 15-16. But Congress could not have intended to incorporate "the well-settled" or "widely accepted" common-law definition of battery, if there is not one well-settled or widely accepted common-law definition. *See Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("Congress intends to incorporate the *well-settled meaning* of the common-law terms it uses") (emphasis added) (citation omitted); *Morissette v. United States*, 342 U.S.

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3. See also *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. Ct. App. 2013)(allowing "a finder of fact to infer the general intent to commit a crime from reckless conduct" and applying that to statutory "simple assault").

246, 263 (1952) (allowing courts to presume that Congress knows of and adopts "widely accepted definitions" of terms of art that it uses, absent contrary direction). In the absence of a uniform common law definition, therefore, the plain meaning statutory interpretation of the Lautenberg Amendment would include any MCDV under which a defendant was convicted, with whatever *mens rea* the applicable federal, state, or Tribal statute required.

II. EXCLUDING RECKLESSNESS FROM THE DEFINITION OF AN MCDV WOULD RENDER THE LAUTENBERG AMENDMENT LARGELY INEFFECTUAL IN MANY STATES DUE TO THE PRACTICALITIES OF MISDEMEANOR ADJUDICATIONS.

Amici agree with the Government's assertion that, if reckless crimes are excluded from the definition of an MCDV, the Lautenberg Amendment would become a "dead letter" in a majority of states under an elements-based "categorical approach" to determining whether a predicate offense qualifies as an MCDV. *Hayes*, 555 U.S. at 427 (rejecting an interpretation under which § 922(g)(9) would have been a "dead letter"); Gov. Br. at 38-40. *Amici* explain herein that, due to the realities of misdemeanor prosecution, even if this Court's *modified* categorical approach is applied to states with "divisible" statutes[4] that theoretically permit courts to identify the *mens rea* under which a defendant was convicted, the result will be no different.

---

4. *Amici* join the United States in recognizing that the definition of a "divisible" statute is currently in contention. Gov. Br. at 44.

A. The Application of the Modified Categorical Approach to State Assault and Battery Convictions

This Court has required a purely elements-based approach to determining whether a state conviction constitutes a predicate offense for a federal statutory crime. *Descamps v. United States*, 133 S. Ct. 2276, 2281-82 (2013). Where, however, statutes contain alternative elements by which an offense can be proven, some combinations of which will qualify as a predicate offense and others that will not (*i.e.*, "divisible" statutes), courts are permitted to look to the record to determine which elements formed the basis for conviction in a given case. *See Taylor*, 495 U.S. at 602; *Shepard v. United States*, 544 U.S. 13, 19-21 (2005); *Descamps*, 133 S. Ct. at 2281-82 (2013) (recognizing the "modified categorical approach"). Under this "modified categorical approach," it is permissible to examine certain reliable "approved documents," such as the charging instrument, plea agreement forms, the plea colloquy, jury instructions, or judgment of conviction to determine exactly which elements formed the basis for the defendant's conviction. *Shepard*, 544 U.S. at 25-26; *Descamps*, 133 S. Ct. at 2283-85.

As this Court has repeatedly observed, "perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws.'" *Castleman*, 134 S.Ct. at 1411 (quoting *Hayes*, 555 U.S. at 427). As shown in Appendices B and C of the Government's Brief, at least 16 states have assault or battery statutes that list (in the same subsection) more than one *mens rea* level including recklessness, any of which will suffice for

conviction if bodily injury results.[5] These statutes are, in principle, "divisible" under the *Descamps* framework, and theoretically permit a review of reliable "approved documents." *Shepard*, 544 U.S. at 20-21. Nevertheless, the manner in which such crimes are adjudicated—whether by guilty plea or by trial—only rarely generates documentation sufficient to identify the basis for the conviction. Where the *mens rea* cannot be determined, the conviction must be presumed to have been based on the lowest level of culpability (*i.e.*, recklessness). *See Johnson v. United States*, 559 U.S. 133, 137 (2010). Thus, however purposeful/intentional or knowing the offender's conduct may *actually* have been, the absence of a reliable means to ascertain the basis for a domestic violence conviction means the convicted offender will not be prohibited from obtaining a firearm, if convictions based on recklessness do not qualify as MCDVs. Several factors in the adjudication process contribute to this result.[6]

1. Charging

If a misdemeanor crime is the only offense charged, the charging document is likely to simply track the language of the statute. A charge for simple assault is likely to allege

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5. These jurisdictions include Arizona; Colorado; Delaware; Hawaii; Kansas; Kentucky; Maine; Mississippi; Nebraska; New Jersey; Oregon; Pennsylvania; Tennessee; Texas; Vermont; Wyoming. *See* Gov. Br. at App. B and C.

6. Much of the information incorporated in Section II of this brief is based on the experience and insights of Attorney Advisor Teresa Garvey of *amicus* AEquitas, who prosecuted thousands of domestic violence crimes, the vast majority of which involved assaults, over a 22-year career as an Assistant Prosecutor in Camden County, New Jersey.

that on a particular date and time, in a specific place, the defendant "purposely, knowingly, or recklessly" inflicted bodily injury on the victim. By charging all of the possible alternatives, the prosecutor increases the likelihood that at least the minimum requisite culpability can be proven. The prosecutor has nothing to gain by charging that a defendant acted purposely if reckless conduct will suffice for a conviction. Thus, the charging document itself is unlikely, in most cases, to shed any light on the culpability element for which the defendant was convicted.

2. Guilty pleas

Tens of thousands of crimes of domestic violence—both felonies and misdemeanors—are prosecuted in the United States every year.[7] The vast majority of domestic violence crimes, like other crimes, are disposed of without trial—most often by plea agreement.[8]

A vast range of options is available to prosecutors and defense attorneys in the plea bargaining context

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7. While exact statistics for domestic violence prosecution are not available, a 2000 study of arrests in 18 states and the District of Columbia indicates there were in that year 82,056 arrests for crimes of violence, including aggravated and simple assault, in which the offender/victim relationship was spouse, parent, or son/daughter. Matthew R. Durose, *et al.*, *Family Violence Statistics*, U.S. DOJ, BUREAU OF JUST. STAT. 1, 41 (2005), http://www.bjs.gov/content/pub/pdf/fvs.pdf.

8. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012) (noting that 94% of state convictions are the result of guilty pleas). Other possible dispositions include dismissal of charges for unprovable cases or, in some instances, a deferred disposition or referral to a diversionary program.

for assaultive crimes. In addition to negotiating a recommended sentence or other disposition within the available statutory range, typically a number of different criminal charges could potentially apply to a given set of facts, each with its own range of potential sentences.[9]

When a plea offer for a felony or misdemeanor offense is extended, the prosecutor in a jurisdiction with multiple culpability elements generally has no reason to be concerned with the defendant's state of mind at the time of the offense, so long as the minimum culpability is admitted. The recommended sentence within the statutory range has probably already been agreed upon; moreover, even in the case of an "open" plea with no specific sentencing recommendation, the prosecutor is unlikely to insist upon a plea to a crime committed with a specific state of mind. There is usually no real or perceived benefit in doing so. The sentencing range is the same; the defendant's future criminal record will reflect a conviction for the same offense regardless of the defendant's state of mind. Thus, any plea agreement documents are unlikely to specify a particular culpability level.

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9. Under the Model Penal Code ("MPC"), for example, depending upon the quantum of bodily injury risked or inflicted, the defendant's state of mind, and whether or not a deadly weapon was used, assault can range from a petty misdemeanor (MPC § 250.4(4), harassment by offensive touching), to a misdemeanor (MPC § 211.1(1), simple assault), to a third-degree felony (MPC § 211.1(2)(b), aggravated assault with a deadly weapon), to a second-degree felony (MPC § 211.1(2)(a), aggravated assault by attempting to cause or causing serious bodily injury) – with associated sentences ranging from a handful of days to up to ten years. MPC §§ 6.08, 6.06(3), 6.06(2).

The plea colloquy is unlikely to be of any assistance, either, in determining what crime a defendant has admitted in his guilty plea, assuming that a transcript of the colloquy exists. Defendants are, understandably, likely to minimize their actions as the product of reckless behavior rather than admitting purposeful or knowing infliction of injury—provided the statute allows it. By permitting the defendant to "save face" in this manner, the prosecutor may be more likely to secure a satisfactory guilty plea to the misdemeanor offense, and many defendants will take advantage of the opportunity to minimize their conduct to the extent possible, consistent with their plea agreement.

The trial judge accepting a guilty plea typically has no reason to be concerned about whether a defendant admits purposely, knowingly, or recklessly inflicting injury, especially in the context of a simple assault or battery, where the range of punishment is usually limited. So long as the defendant admits guilt of the offense and at least the minimum required culpability, the judge is likely to accept the guilty plea, and the judgment of conviction will simply indicate the crime of conviction without specifying a particular level of culpability.

Whatever the evidence *might* have shown in terms of the defendant's intent to commit the crime, when a defendant pleads guilty to a simple assault or battery in any of the states with alternative levels of culpability, neither the charging document, nor the plea agreement documents, nor the plea colloquy, nor the judgment of conviction is likely to reflect anything more than recklessness.

3. Conviction after trial

Even in the trial context, regardless of whether the defendant is tried only for the misdemeanor offense or tried for a more serious felony but convicted of a misdemeanor as a lesser-included offense,[10] the same kinds of considerations will impact the availability of documents sufficient to determine the judge's or jury's findings with regard to the defendant's state of mind. There is seldom any reason for prosecutors, judges, defendants, or defense attorneys to be concerned about the nice distinctions between various levels of culpability that result in conviction for the same offense with the same range of available sentences; that lack of concern will be reflected in documents devoid of any indication of the culpability for the crime of which the defendant was convicted.

First, jury instructions for a simple assault or battery crime with alternative culpability elements will usually encompass all of the possible alternatives and are therefore unlikely to reveal whether reckless conduct, or something more, was the basis for the jury's verdict.

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10. Even when cases are prosecuted as felonies and taken to trial, misdemeanor offenses are often lesser-included crimes that the fact-finder must consider if the defendant is found not guilty of the charged greater offense. If, for example, there is reasonable doubt as to whether a victim's injury qualifies as "serious bodily injury," the fact-finder may be called upon to consider whether the defendant purposely, knowingly, or recklessly caused a lesser degree of bodily injury and should, therefore, be found guilty of simple assault rather than aggravated assault.

Second, proof problems that are common in domestic violence cases increase the likelihood of the jury returning a verdict of guilt on a lesser-included misdemeanor offense even where the defendant is being tried for a felony assault. Often the only eyewitness to a domestic violence assault is the victim, who may be reluctant to participate, fail to appear in response to subpoena, recant a prior statement, minimize the defendant's conduct, or even testify on behalf of the defendant.[11] In such cases, there is an increased likelihood that a guilty verdict (if one is returned) will be to a lesser-included offense, such as a simple assault.

Third, in bench trials, a judge rendering a verdict may issue findings of fact as part of that verdict, and those findings *might* reveal the judge's findings as to the defendant's culpability. However, it is likely that such findings will extend only to the minimum culpability necessary to support a finding of guilt, since that is the only finding the judge would be required to make for purposes of rendering the verdict.

Even under the modified categorical approach, therefore, the record is highly unlikely to disclose a basis for conviction greater than recklessness. If recklessness is excluded from the MCDV definition, the vast majority of convicted defendants in these jurisdictions would still be free to possess a firearm. This result would eviscerate the

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11. Victims of domestic violence are far more likely to avoid participating in criminal trials or to recant their accusations than any other crime victims. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. R. 747, 768 (2005). It is estimated that victims of domestic battery recant or refuse to participate in the prosecution approximately 80-90% of the time. *Id.*

protection Congress intended to afford victims of domestic violence when it enacted the Lautenberg Amendment.

III. RECKLESSNESS IS BOTH SERIOUS AND DANGEROUS, PARTICULARLY WHEN GUNS AND/OR DOMESTIC VIOLENCE ARE INVOLVED.

A substantial portion of Petitioners' brief is devoted to suggesting that misdemeanor convictions for reckless conduct, particularly in the domestic violence context, penalize conduct that is only "accidental," "minor," and that often involves "minor harms or no harm at all." Pet. Br. at 21, 25, 32. Petitioners therefore argue that "a lifetime ban on firearm possession based on reckless conduct presents an insufficient connection between the target concern, protecting victims of domestic violence, and the remedy, disarming perpetrators of domestic violence.'" *Id.* at 34. To the contrary, copious evidence supports Congress's judgment that those who act with conscious disregard of the risk of injury to their domestic partners should not possess guns.

A. Recklessness is Widely and Authoritatively Recognized as Criminally Blameworthy and Dangerous Conduct.

Petitioners mischaracterize recklessness as "accidental" conduct, and suggest that, particularly when linked to offensive touching, such non-intentional offenses do not warrant removing a perpetrator's firearms. *Id.* at 21, 34. Their characterization of both recklessness and reckless offensive contact, however, ignores the well-settled acceptance of recklessness as a culpability standard, and erroneously suggests a legally relevant

difference between reckless battery convictions arising from offensive contact or causing injury.

Reckless conduct is far more than an accident, and in some settings – such as those involving firearms – is extremely dangerous. Both Maine's criminal statute and the Model Penal Code define recklessness as requiring that a person "consciously disregards" a risk that person's conduct will cause an unjustified result. ME. REV. STAT. 17-A § 35(3)(A) and (C).[12] *See* MPC § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk "). Reckless battery, therefore, necessarily entails much more than carelessness or "accident": the perpetrator knows that his conduct imposes a substantial risk of unacceptable harm to the victim, yet consciously chooses to disregard that risk and intentionally engages in that conduct anyway.

That recklessness is a serious and credible basis for criminal culpability is underlined by the fact that the Model Penal Code, produced by the leading criminal law experts in the country after extensive deliberations,[13] specifically assigns recklessness as the minimum default

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12. "A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result . . the disregard of the risk . . must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." ME. REV. STAT. 17-A § 35(3)(A) and (C).

13. *See* Project Life Cycle, https://www.ali.org/projects/project-life-cycle (last visited Jan. 21) (describing the "diverse group of practitioners, judges, and scholars" who are "selected for their particular knowledge and experience of the subject" who develop the American Law Institute's projects, including the Model Penal Code).

mens rea for offenses with no specified intent requirement. MPC § 2.02(3).[14] The MPC is considered a highly influential articulation of standards of criminal culpability.[15] Given the purpose of the Lautenberg Amendment – to keep guns out of the hands of domestic abusers – it is unlikely that Congress would have sought to be more restrictive than the MPC. *See* Remarks of Sens. Feinstein and Lautenberg, *supra* at 7.

Moreover, there can be no doubt that reckless conduct, particularly with guns, is extremely dangerous. For example, one caller to the National Domestic Violence Hotline reported "My abuser has played Russian Roulette with me before and has pulled the trigger." Other callers have reported that their abusers have fired a gun in the

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14. While this Court in *Elonis v. United States*, 135 S. Ct. 2001 (2015), declined to reach the question of whether the Court should likewise read recklessness into a federal threat statute, Justice Alito's concurrence made a strong case for it: "[W]hen Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed . . . There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct." *Elonis*, 135 S. Ct. at 2015 (Alito, J).

15. Richard G. Singer, *Foreward*, 19 RUTGERS L. J. 519-20 (1988) ("celebrat[ing] and reflect[ing] upon one of the most historic documents in the history of the criminal law . . . the crowning achievement of the Code [is that] it has brought unity and cogency to the chaos of the common law and its development in this country."); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L. Rev. 671 (1988) (echoing Herbert Packer's "accolades for the Code" because it "'restored intellectual respectability to the substantive criminal law '").

house, held it up to them while arguing, and worse.[16] *See Castleman*, 134 S. Ct. at 1408-09 (noting that the presence of a gun in a home significantly increases the probability of death in incidents of domestic violence), citing Jacquelyn C. Campbell, *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT. INST OF JUST. J. 16 (2003) ("When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed").[17]

In addition, Petitioners misleadingly suggest that offensive contact, when committed recklessly, is somehow more minor or less a concern with regard to gun possession than reckless battery that causes injury.[18]

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16. "The children's father has held up the gun to my head in front of my two girl [sic] and unlocked the safety . . . When I tried to break up with him he turned the gun away from me and shot it. And the craziest thing is he was a convicted felon in [Text Removed] and they handed him his gun license right back." These examples come from survey data and call summaries compiled by the National Domestic Violence Hotline and provided by electronic mail to *amicus* DV LEAP on 1/20/2016.

17. According to the Centers for Disease Control, more female intimate partners are killed by firearms than by all other means combined. Andrew R. Klein, *Practical Implications of Current Domestic Violence Research, Part II: Prosecution*, U.S. DOJ REPORT 36 (2008), citing Leonard J. Paulkossi, *Surveillance for Homicide among Intimate Partners-United States, 1991-1998*, MORBIDITY AND MORTALITY WEEKLY SURVEILLANCE SUMMARIES 5, 1-16 (2001).

18. The question on which this Court granted *certiorari* was stated in the Petition for *Certiorari* as "Does a misdemeanor crime with the *mens rea* of recklessness qualify as a 'misdemeanor crime of domestic violence' as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?" Pet. Br. at (i). Petitioners' merits brief appears to narrow that question. Pet. Br. at 1-2 ("[t]his case presents a narrow

The distinction has no salience, however, in this context. The very nature of reckless battery entails *conscious disregard* by the perpetrator of the risk to the victim. Reckless batteries resulting in serious injury are often distinguished from reckless offensive touching solely by happenstance – nothing else. To build on the First Circuit's example, recklessly throwing a knife towards a battered spouse could result in a deep gash or could just graze the victim without causing injury. *United States v. Voisine*, 778 F.3d 176, 185 (1st Cir. 2015). Whether the conduct injures or offends, and the severity of any injury, are purely a matter of chance, beyond the abuser's control. In these circumstances, as a legal matter, the abuser's conduct and culpability for consciously placing the victim at risk of harm is identical regardless of the ultimate degree of harm. As this Court held in *Castleman*, the Lautenberg Amendment's definition of misdemeanor crimes of domestic violence encompasses both violent "severe domestic abuse" and domestic battery that involves offensive contact. 134 S. Ct. at 1413, 1415. There is neither a legal nor public policy basis to distinguish between the two for purposes of the *mens rea* question before the Court.

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question of statutory interpretation: Whether the 'use or attempted use of physical force' under 18 U.S.C. § 921(a)(33)(A) extends to merely reckless (as opposed to intentional) *offensive physical contact*") (emphasis added). As described in this Section, however, the distinction Petitioners attempt to draw is legally irrelevant and misleading.

B. Even Reckless and Seemingly Minor Domestic Violence Crimes are Often Linked to an Abuser's Intentional Coercive Control Over the Victim and to Serious Risk of Lethal Harm.

1. Reckless batteries are part of an intentional course of conduct.

Petitioners minimize reckless domestic violence crimes as "accidental," "minor" or "less serious," Pet. Br. at 24-25, 28, 32, and miss the essential defining characteristic of abusers' violence against their partners: an intentional pattern of coercive control that constantly exposes victims to danger. As this Court has recognized, domestic violence is rarely a single incident, but is typified by an ongoing pattern of abuse and a dynamic of power and control.[19] Leading researchers describe domestic battering as "a course of calculated, malevolent conduct, deployed almost exclusively by men to dominate individual women, by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and

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19. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 889-93 (1992) ("Wife-battering or abuse can take on many physical and psychological forms . . . it is common for the battering husband to also abuse the children in an attempt to coerce the wife.... Many [women] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends"). *See also Castleman*, 134 S. Ct. at 1411 ("'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context. *See* Brief for National Network to End Domestic Violence, *et al.* as *Amici Curiae* 4–9.").

control."[20] In most domestic violence, the "batterer's quest for control of the woman [lies] at the heart of the battering process."[21] Guns are frequently used in furtherance of this process. In a survey of 417 women in 67 battered women's shelters in California, for example, 65% of women who lived in homes with guns before seeking shelter reported that their abuser had used a gun to scare, threaten or harm them.[22] *See generally*, Brief of Domestic Violence Hotline, *et al.*

Thus, even when a particular charged crime involves a *mens rea* of recklessness and an *actus reus* of offensive contact, the individual crime charged is typically only one part of a larger pattern of intentional, malevolent, and purposeful conduct. *Castleman*, 134 S. Ct. at 1412 ("the accumulation of such [minor] acts over time can subject one intimate partner to the other's control"). It is therefore not at all out of proportion for Congress to remove guns from those convicted of misdemeanor crimes of domestic violence with a recklessness *mens rea*.

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20. Evan Stark, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007). *See also* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 NORTHWESTERN J. OF CRIM. LAW & CRIMINOLOGY 959, 962-963 (2003-2004) ("Outside the criminal law context, domestic violence is widely understood as an ongoing pattern of behavior defined by both physical and non-physical manifestations of power. This is a remarkably uncontroversial proposition. For women whose lives it describes, the oft-described 'power and control' dynamic is ubiquitous. . . .").

21. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 5 (1991).

22. Susan B. Sorenson & Douglass J. Wiebe, *Weapons in the Lives of Battered Women*. 94 AM. J. OF PUB. HEALTH 1412-17 (2004).

2. Seemingly minor acts can be injurious, terrifying, and harbingers of homicide.

Moreover, even individual reckless acts that may appear "minor" often entail risk of serious harm or compound victims' terror. For instance, *Amici* have handled cases in which (i) an abuser recklessly hurled a jar in the direction of his partner, missing her but almost hitting her baby; (ii) the abuser angrily slammed the door on his partner who was trying to leave, crushing her fingers; and (iii) an abuser threw a plate of hot food at his partner, leaving her uninjured but with food dripping from her face and hair. Regardless of whether severe, minor, or no injury results, such conduct displays a volatility that terrorizes and controls the victim. This is so regardless of whether the act itself was intended to injure the victim or just to express the perpetrator's rage – and regardless of whether injury or only "offensive touching" results. In short, criminalizing possession of firearms based on "minor acts" such as this is not excessive in relation to either the risks posed by the conduct or its over-arching intent, regardless of whether the particular act was intentionally or recklessly committed and of the severity of the resulting contact.

Indeed, seemingly "minor" acts of domestic violence are sometimes only minutes away from homicide. For example, in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), the police ignored a mother's repeated pleas to arrest her estranged husband for violating her protection order when he took the children without permission; the father then murdered the children. *Id.* at 751-754. *See also Campbell v. Campbell*, 682 A.2d 272, 273 (N.J. Sup. Ct. 1996) (after police failed to arrest

respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 201-02 (N.Y. 1997) (victim stabbed to death after police failed to arrest husband—despite knowing he was visiting neighbors next door—after he violated order by entering her home and removing her furniture). This Court has recognized that even a minor domestic violence misdemeanor conviction can be a red flag for potentially lethal violence. *Castleman*, 134 S. Ct. at 1408-09. *See also* Jacquelyn C. Campbell, *Danger Assessment*, https://www.dangerassessment.org/DA.aspx (empirically supported instrument includes slapping, hitting, and minimally violent behaviors, in assessing risks of lethality).

For all these reasons, a leading expert in domestic violence and criminal justice states that "[o]ne of the most crucial steps to prevent lethal violence is to disarm abusers and keep them disarmed. . . [pursuant to] 18 U.S.C. Sec. 922(g)(9)." Andrew R. Klein, *Practice Implications of Current Domestic Violence Research*, 37 (2008).

Petitioners' attempt to cast doubt on the fact that "[d]omestic violence often escalates in severity over time," as this Court recognized in *Castleman*, 134 S. Ct. at 1408, must fail. *See* Pet. Br. at 28 n. 10 ("the available data suggest that the notion that domestic disputes are repeated and *necessarily* evolve into ongoing violence . . . is inconclusive") (emphasis added). Petitioners' sole support for this argument is a questionable interpretation of a single study, which does not support their assertion. [23] Moreover, one need not meet Petitioners' straw man

23. Petitioners cite for this proposition, Christopher D. Maxwell, *et al.*, U.S. Dep't of Justice, *The Effects of Arrest on*

of 100% consistency to know that as a general matter, domestic violence does indeed almost always repeat, and very often escalates. *See e.g.*, Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 291 (1987). In fact, specialists in risk assessment agree that both a history of misdemeanor-level violence and coercive control are among the primary red flags for potential homicide. *See* Gavin de Becker, THE GIFT OF FEAR 183 (1997) (cataloging, among other indicators of domestic violence homicide risk, acts of coercive control such as resolving conflict with intimidation, bullying and violence; breaking or striking things in anger, and a history of police encounters for behavioral offenses, such as threats, stalking, assault and battery).[24]

Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program, U.S. DOJ, NAT'L INST. OF JUST. 1-15 (2001). Counter to their depiction, the Maxwell study found, among other things, that "[a]rrest is associated with less repeat offending..." and that reports from victims showed greater recidivism than arrest rates alone. *Id.* at 2. Given the extremely short follow-up period of six months, *id.* at 3, this study's recidivism findings are of limited significance for purposes of this case. *See* text, *infra*.

24. "Women's risk of homicide (femicide) increased for women who separated from their abusers after living together, particularly when the abuser was highly controlling." Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 556 (2010) (citing Jacquelyn C. Campbell, *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. OF PUBLIC HEALTH, 1089-1097 (2003)); Campbell, *Assessing Risk Factors*, *supra*, at 14-19.

A comprehensive overview of empirical research on domestic violence and recidivism confirms that most individuals arrested for domestic violence have criminal records (not necessarily for domestic violence crimes),[25] and that "a hard core of a third of abusers will re-abuse in the short run and more will re-abuse in the longer run."[26] Studies have found that the rate of re-abuse during follow-up periods of four months to two years ranged from 24% to 60%.[27] Moreover, "[r]e-abuse has been found to be substantially higher in longer term studies."[28] Two found abuse re-arrest or protection order violation rates of almost 60% over five and ten years.[29] Of particular importance here, among the factors predictive of repeat abuse and of lethality, a key factor is the presence of firearms in the household.[30]

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25. Rodney Kingsworth, *Intimate Partner Violence: Predictors of Recidivism in a Sample of Arrestees*, 12 VIOLENCE AGAINST WOMEN 917-935 (2006) (finding that an offender's prior arrest for any offense predicted re-arrest for intimate violence within an 18-month follow-up period).

26. Klein, *Practical Implications*, *supra*, at 26.

27. *Id.* at 26, n. 121.

28. *Id.* at 27.

29. *Id.* at 27 (citations omitted). Notably, the research also confirms that re-arrest is not a complete measure of recidivism, because so much ongoing abuse is either not reported or not subjected to arrest. Richard B. Felson, Jeffrey M. Ackerman, & Catherine Gallagher, *Police Intervention and the Repeat of Domestic Assault*, U.S. DOJ, NAT'L INST. OF JUST. (2005)(finding that only half of subsequent assaults were reported to police).

30. Campbell, *et al.*, *Risk Factors for Femicide*, *supra*, *at* 1089, 1097; Campbell, *Assessing Risk Factors*, *supra*, at 14-19.

In short, the evidence shows that domestic violence incidents need not involve specific intent nor constitute major violence in order to be predictive of future risk, and that guns place victims of domestic violence at significantly greater risk. Against this backdrop, the government's compelling interest in removing guns from those convicted of misdemeanor crimes of domestic violence, whether involving actual injury or offensive contact, cannot be gainsaid.

IV. MANDATORY ARREST AND NO-DROP PROSECUTION POLICIES NEITHER REMOVE DISCRETION NOR RESULT IN OVER-PROSECUTION OF DOMESTIC VIOLENCE.

Petitioners claim that, due to mandatory arrest laws and no-drop prosecution policies, many undeserving domestic violence misdemeanors are "swept" into the criminal justice system. Pet. Br. at 10, 26, 27. They assert that such policies mean that "police and prosecutors do not have the discretion to forego arrest and prosecution in cases where the conduct is minor or unclear." *Id.* at 27 (citation omitted). This is entirely incorrect.

First, the purpose of mandatory arrest laws and no-drop prosecution policies is not to treat domestic violence more seriously than other crimes; it is to correct for past practices of refusing to treat domestic violence as a crime at all.[31] Mandatory arrest laws and prosecution

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31. Prior to the late 1980s, police often avoided responding to domestic violence calls and refused to make arrests. *See* Chief William L. Hart, *et al.*, *U.S. Attorney General's Task Force on Family Violence*, FINAL REPORT 16-18 (1984), http://babel.hathitrust.org/cgi/pt?id=umn.31951d00277593j;view=1up;seq=3; Joan Zorza,

no-drop policies were correctives to widespread exercises of discretion to refuse to arrest or prosecute for domestic assaults. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 46, 48 (1992) (describing police departments with a "clear non-arrest policy").

Petitioners greatly overstate the effect of these reform policies, however. Mandatory arrest laws and no-drop prosecution policies do not, and cannot, eliminate police or prosecutor discretion. Mandatory arrest means only that police may no longer refuse to arrest *when there is probable cause to believe a crime has been committed. See* Zorza, *supra*, at 63, 64. Police must still assess the facts and determine if probable cause has been met; if it has, under mandatory arrest laws they are simply required to treat domestic violence no differently than any other crime. *See Town of Castle Rock*, 545 U.S. at 760 ("We do not believe that these provisions of Colorado [mandatory arrest] law truly made enforcement of restraining orders mandatory. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes").

The Criminal Law of Misdemeanor Domestic Violence, 1970-1990, 83 J. OF CRIM. L. & CRIMINOLOGY 16-18 (1992); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996). Studies conducted in the 1980s and 1990s found that arrests occurred in only 3% to 14% of all intimate partner cases to which officers actually responded. Eve S. Buzawa & Carl G. Buzawa, *Introduction*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE (1992) at vii, xvi. Similarly, prosecutors historically resisted prosecuting abuse, downgraded severe violence to misdemeanor charges, and dropped cases when victims expressed any ambivalence. *See* Zorza, *supra*; U.S. Attorney General's Task Force Final Report (1984), *supra*.

It is thus not surprising that, at best, mandatory arrest laws have resulted in arrest rates of approximately 50%,[32] a figure that should be taken in the context of the likelihood that official rates may not account for additional cases that are screened out "based on departmental priorities [even] before they are recorded as domestic or an officer is dispatched."[33] And despite the significant and valuable changes that mandatory arrest has brought to police practice, police response to domestic violence continues, in some quarters, to be deeply inadequate. *See* Barbara Hart, *Policing Domestic Violence*, 21 NAT'L BULLETIN ON DOMESTIC VIOLENCE PREVENTION, 1 (2015) ("Much has changed in 40 years. Much has not.") (describing two 2015 national surveys of domestic violence victims that reported widespread police hostility toward victims, refusal to believe reports of abuse, minimizing the risks, and other biases).

Similarly, no-drop policies were adopted in many prosecutors' offices, not to prioritize domestic violence prosecutions over other crimes, but rather to overcome prosecutorial ambivalence and resistance to going forward with these often difficult cases.[34] These policies are also

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32. David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates* (2008), retrieved at https://www.ncjrs.gov/pdffiles1/nij/222679.pdf. This report analyzed data from the National Incident-Based Reporting System in multiple jurisdictions in 2000. Among other things, it found that despite mandatory arrest policies, dual arrest remains quite low (about 2%). *Id.* at § 1.

33. Stark, *supra* at 62 (describing this practice as a "problem with accurately measuring attrition" [i.e., rates of police response]).

34. As one prosecutor stated: "When I look back at how it used to be with battered women, I can see that it was a self-fulfilling

necessary in order to remove the burden on victims of "choosing" whether to go forward or not – a practice that subjects victims to perpetrators' coercion to drop or recant the charges. *See* Hanna, *supra.*

In fact, the picture today is of prosecution policies and practices that run the gamut across the country, from minimal prosecution to quite effective no-drop policies. A review of 120 studies from over 170 mostly urban jurisdictions in 44 states and the District of Columbia of intimate partner prosecutions between 1973 and 2006 found a range of prosecution rates from 4.6% of arrests in Milwaukee in 1988-89 to 94% of arrests in Cincinnati, Ohio in 1993-96. Klein, *Practical Implications, supra,* at 41.

Even at their most rigorous, no-drop policies do not and cannot prevent prosecutors from (i) choosing not to file charges in the first instance, and (ii) dismissing cases when they deem the evidence insufficient to go forward. [35]

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prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, 'It's always the same with these cases.'" Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* NAT'L INST. OF JUST. 55 (1986).

35. Barbara E. Smith, Robert Davis, Laura B. Nickles & Heather Davies, *An Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict,* Final Report vii (2001) ("no-drop is more a philosophy than a strict policy of prosecuting domestic violence cases. None of the prosecutors pursued every case they filed. Prosecutors were rational decision-makers who were most likely to proceed without the victim's cooperation if they had a strong case based on other evidence.").

Petitioners' reliance on a Bureau of Justice Statistics study to suggest domestic violence is being prosecuted even more than other crimes overstates what the study was able to examine. Pet. Br. at 27, citing Erica Smith, *et al.*, *State Court Processing of Domestic Violence Cases*, DOJ, BUREAU OF JUST. STAT. (2008) ("Smith"). That study actually measured only prosecutions that moved forward *after cases were filed* by prosecutors. Those cases which prosecutors screened out and declined to charge altogether "could not be included in the calculation of the prosecution rate because that information was not collected in the 15-county study." Smith, at 7. In fact, the follow up report on the same data states that 21-49% of cases were dismissed by prosecutors after initial charges were filed. Erica L. Smith & Donald J. Farole, *Profile of Intimate Partner Violence Cases in Large Urban Counties*, U.S. DOJ, BUREAU OF JUST. STAT. (2009) (Table 17).

The bottom line continues to be that only a fraction of domestic violence incidents result in arrest, and far fewer result in prosecution, let alone conviction.[36] Petitioners' hyperbolic claims about mandatory arrest laws and no-drop prosecution policies sweeping many cases of questionable, minor or innocent conduct into the criminal justice system, let alone going to conviction, are thus demonstrably false. Therefore, Petitioners' claim that applying the Lautenberg Amendment to reckless batteries will deprive many innocent or fundamentally benign individuals of their guns is, quite simply, fiction. *See Castleman*, 134 S. Ct. at 1412 ("If a seemingly minor act like this draws the attention of authorities and leads

36. Stark, *supra* at 62-63; Smith & Farole, *supra* (percentages of filed charges that went to conviction ranged from 17% to 89% across 16 jurisdictions).

to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence'").

CONCLUSION

For all of the reasons described in this brief, *Amici* respectfully submit that this Court should affirm the decision of the First Circuit upholding Petitioners' convictions on the grounds that the Lautenberg Amendment's definition of a misdemeanor crime of domestic violence includes convictions for reckless battery.

Respectfully submitted,

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No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with more than three million supporters fighting for public safety measures that respect the Second Amendment and help save lives. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, which arose in the wake of the gun murders of twenty children and six adults at an elementary school in Newtown, Connecticut.

A critical part of Everytown's mission is advocating for comprehensive, consistent enforcement of existing laws designed to keep dangerous weapons out of the hands of convicted domestic abusers. It submits this *amicus* brief to demonstrate that keeping American communities safe for everyone—including victims of domestic violence and the law enforcement officers who are called upon to protect them—requires interpreting 18 U.S.C. § 922(g)(9) in accordance with its plain meaning and the clear intent of Congress to prohibit a person convicted of *any* "misdemeanor crime of domestic violence" from possessing a firearm. Everytown's research demonstrates the clear danger of guns in the hands of convicted domestic abusers and underscores why the Court should reject Petitioners'

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for Petitioners and Respondent have consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than *amicus* make any monetary contribution intended to fund the preparation or submission of this brief.

dangerous view of § 922(g)(9), which would eviscerate the federal prohibition on gun possession by domestic abusers convicted of misdemeanor offenses.

SUMMARY OF ARGUMENT

This case lies at the deadly intersection of two national epidemics: domestic violence and gun violence. American women are eleven times more likely to be shot to death than women in other developed countries.[2] A majority of those murders are committed by family members or intimate partners—who, on average, fatally shoot fifty-two women each month.[3] As this Court has observed, "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States v. Hayes*, 555 U.S. 415, 427 (2009).

The evidence demonstrating the disproportionate risk of guns in the hands of domestic abusers is tragically clear. A firearm in the home *quintuples* the risk that an individual with a history of domestic violence will subsequently murder an intimate partner.[4] The high rates of recidivism among domestic

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[2] Arkadi Gerney & Chelsea Parsons, Center for Am. Progress, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them* (June 18, 2014), www.americanprogress.org/issues/guns-crime/report/2014/06/18/91998/women-under-the-gun.

[3] Everytown for Gun Safety, *Gun Violence by the Numbers*, www.everytownresearch.org/gun-violence-by-the-numbers/#DomesticViolence.

[4] A case-control study of 563 women in abusive relationships found that perpetrators' access to firearms increased the risk of homicide in abusive relationships fivefold, while victims' access to weapons did not serve as a protective measure. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1089–97 (July 2003).

abusers are well established. And when such recidivism occurs, the presence of a firearm dramatically increases the risk to the victim: domestic assaults with firearms are approximately *twelve times* more likely to end in the victim's death than assaults by knives or fists.[5]

That a prior domestic violence incident was charged as—or, frequently, pleaded down to—a misdemeanor offense does not eliminate these risks. Indeed, individuals convicted of multiple *misdemeanor* domestic violence offenses commit subsequent violent felonies with rates of recidivism comparable to those who have been convicted previously of multiple *felony* assaults.[6] Bipartisan recognition of the substantial and unique risk of misdemeanor domestic violence offenses caused Congress to enact § 922(g)(9) in 1996, making it a federal offense for any person convicted of a misdemeanor crime of domestic violence to possess a firearm. § 922(g)(9). That provision, commonly known as the Lautenberg Amendment, implements Congress's intent to close a "dangerous loophole." *See Hayes*, 555 U.S. at 426–27. Prior to § 922(g)(9)'s enactment, domestic violence misdemeanants could legally buy and possess firearms because even serious domestic violence offenses were commonly charged as, or pleaded down to, misdemeanors. *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014). The Lautenberg Amendment resulted from

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[5] *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (en banc).

[6] Washington State Institute for Public Policy, *Washington's Offender Accountability Act: Department of Corrections' Static Risk Instrument* (Mar. 2007), www.wsipp.wa.gov/ReportFile/977/Wsipp_Washingtons-Offender-Accountability-ActDepartment-of-Static-Risk-Instrument_Full-Report-Updated-October-2008.pdf.

Congress's further recognition that domestic violence often escalates over time, and that it is "only a matter of time before the violence gets out of hand, and the gun results in tragedy." 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein); *see also* 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (quoting Senator Kay Bailey Hutchinson's statement that the Lautenberg Amendment would keep handguns from individuals "who batter their wives or people with whom they live").

The congressional intent of the Lautenberg Amendment can be fulfilled only by a holding that § 922(g)(9) embraces misdemeanor domestic violence convictions based on a *mens rea* of recklessness. At the time the Lautenberg Amendment was enacted, misdemeanor crimes of domestic violence included offenses committed with a *mens rea* of recklessness under federal law and under the law of thirty-four States and the District of Columbia.[7] The mere fact that the substantial majority of misdemeanor domestic violence statutes extend to reckless conduct compels the conclusion that an intent to capture misdemeanor domestic violence within § 922(g)(9) is

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[7] The number of jurisdictions permitting a conviction for misdemeanor assault with a *mens rea* of recklessness remains unchanged. *See* Resp. Br. at 38; App. B (collecting relevant statutes and judicial decisions). In addition, seventeen States have domestic violence assault provisions that proscribe reckless conduct either expressly or by incorporating the State's general assault and battery provision. *See* Resp. Br. at 39; App. C (collecting relevant statutes). Eight of those statutes existed at the time of § 922(g)(9)'s enactment, and nine such provisions have been enacted since 1996. *Id.*

tantamount to an intent to capture reckless misdemeanor domestic violence offenses. The law of simple assault and battery in those thirty-four States and the District of Columbia has not materially changed since 1996: a misdemeanor crime of domestic violence can still be committed with a *mens rea* of recklessness.[8]

To the extent the categorical approach applies in those thirty-five jurisdictions, the intent of the Lautenberg Amendment would be gutted. In those jurisdictions, in which nearly 60% of this country's population resides,[9] misdemeanor domestic violence offenders would escape the prohibition of § 922(g)(9) and would be free to possess firearms, *even where those offenders were convicted of intentional conduct*. The result of Petitioners' interpretation also would be unacceptable even if some of the misdemeanor domestic violence statutes in those States are amenable to a modified categorical approach. In that scenario, the substantial complexities of administering the modified categorical approach would hamstring courts' ability to properly punish firearm possession in violation of § 922(g)(9). Perhaps even more critically, those same administrative complexities would impose an unworkable burden on the National Instant Criminal Background Check System ("NICS"), which serves as the bulwark against such offenders possessing firearms in the first place. The ability of the already overburdened NICS to keep firearms out of the very hands where their lethality is so dramatically increased would be crippled by

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[8] *See* Resp. Br. at 38; App. B (collecting relevant statutes and judicial decisions).

[9] U.S. Census Bureau, *Population Estimates, State Totals: Vintage 2015* (Dec. 22, 2015), www.census.gov/popest/data/state/totals/2015.

Petitioners' interpretation. Under the modified categorical approach, NICS would be required to discern the *mens rea* of the particular defendant and its significance under the specific statute and, when the record does not permit such discernment, to allow a firearm sale to the misdemeanant to proceed.

The stakes of this decision will be measured in lives. Congress has clearly expressed its intent. This Court should honor that intent by affirming the decision below and holding that the definition of "misdemeanor crime of domestic violence" extends to crimes committed with a *mens rea* of recklessness.

ARGUMENT

Interpreting "misdemeanor crime of domestic violence" as used in § 922(g)(9) to embrace all misdemeanor convictions is compelled by the statutory text and is critical to implementing the federal Gun Control Act's purpose of reducing violent crime.[10] Carving out from the definition of "misdemeanor crime of domestic violence" any offense that can be committed with a *mens rea* of recklessness, as Petitioners advocate, would undermine Congress's federal remedy for a serious national problem. Indeed, the practical effect of adopting Petitioners' interpretation would be either to allow persons convicted of misdemeanor crimes of domestic violence to possess firearms in more than two-thirds of the States, or to render unworkable nationwide the procedures that prevent those persons from purchasing firearms. Either result would be tragic, as confirmed by recent studies and data showing that prohibiting the

[10] Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*

possession of guns by convicted domestic abusers is critical to preventing and reducing gun violence.

I. Armed Domestic Abusers Pose a Lethal Threat Nationwide.

This Court has rightly recognized the persistent and prevalent problem posed by domestic violence in this country. Just two terms ago, in *Castleman*, the Court acknowledged that there are "more than a million acts of domestic violence, and hundreds of deaths from domestic violence," every year. *Castleman*, 134 S. Ct. at 1408 (2014). Recent data from the Centers for Disease Control and Prevention shows that one-third of women in the United States experience physical violence by an intimate partner in their lifetime, and nearly one-quarter of women suffer "severe" physical violence by an intimate partner, including being punched or hit with a hard object, being choked or suffocated, or having guns or knives used on them.[11]

Individuals convicted of domestic violence offenses are dangerous both to their intimate partners and to society at large. Research shows that domestic abusers are prone to reoffend—they do so at rates as high as 30 to 40%—and that they often escalate the violence of encounters when they do. Edward Gondolf, *A 30-Month Follow-Up of Court-Referred Batterers in Four Cities*, 44 Int'l J. Offender Therapy and Comparative Criminology 111, 119 (2000). Domestic violence offenders have higher rates of domestic violence recidivism and higher rates of recidivism involving other violent crimes, including a general

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[11] National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *Intimate Partner Violence in the United States—2010* (Feb. 2014), www.cdc.gov/violence prevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf.

pattern of escalating violence. *Castleman*, 134 S. Ct. at 1408.[12] Not unexpectedly, individuals with a history of committing domestic violence are more likely than other individuals to murder an intimate partner.[13]

Studies further confirm what common sense teaches. Access to guns increases the lethality of domestic violence incidents: "[p]eople with a history of committing domestic violence are more likely to subsequently murder an intimate partner" when a firearm is in the house.[14] Indeed, "[d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *Skoien*, 614 F.3d at 643.[15] Lethal

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[13] The Washington State Institute for Public Policy examined the cases of more than 155,000 people who committed a domestic violence offense in 2008 and studied the cases for a follow-up period of three years. During that three-year period, domestic violence offenders were convicted of a new domestic violence felony or misdemeanor at four times the rate of nondomestic violence offenders. Washington State Institute for Public Policy, *Recidivism Trends of Domestic Violence Offenders in Washington State* (Aug. 2013) www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf.

[13] Everytown for Gun Safety, *Guns and Violence Against Women*, www.everytownresearch.org/documents/2015/09/gun-laws-violence-women-infographic.pdf (citing Mayors Against Illegal Guns, *Felon Seeks Firearm* (2013), www.everytown.org/article/felon-seeks-firearm).

[14] *Id.*

[15] The impact of guns in domestic violence situations is not limited to homicides. In 2004, more than one-third of female domestic violence shelter residents in California reported having been threatened or harmed with a firearm. In homes that contained a gun, nearly two-thirds of the victims' intimate partners had used the firearm against the victim, usually

domestic violence and gun-related domestic violence are inextricably linked. "Over the past 25 years, more intimate partner homicides in the U.S. have been committed with guns than with all other weapons combined."[16] And a woman is *five times* more likely to be murdered if a gun is present in an abusive situation. *Id.* at 642. This Court has itself recognized these facts, acknowledging that "[d]omestic violence often escalates in severity over time . and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408. For all these reasons, a National Institute of Justice report for the Department of Justice conclusively determined that "[o]ne of the most crucial steps to prevent lethal [domestic] violence is to disarm abusers and keep them disarmed."[17]

If this were not enough, the danger posed by domestic violence offenders in possession of firearms is not limited to their spouses or intimate partners. Ample empirical evidence shows that individuals with a history of committing domestic violence offenses are also more likely to commit violent crimes generally. A 2007 analysis involving more than 300,000 convicts

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threatening to shoot or kill her. Susan B. Sorenson et al., *Weapons in the Lives of Battered Women*, 94 Am. J. Pub. Health 1412, 1413 (2004).

[16] Everytown for Gun Safety, *Guns and Violence Against Women*, www.everytownresearch.org/documents/2015/09/gun-laws-violence-women-infographic.pdf (citing Mayors Against Illegal Guns, *Felon Seeks Firearm* (2013), www.everytown .org/article/felon-seeks-firearm).

[17] Andrew R. Klein, National Institute of Justice, DOJ, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* (June 2009), www.ncjrs.gov/pdffiles1/nij/225722.pdf.

showed that individuals who committed domestic violence assault were more likely to subsequently commit a violent felony.[18] Felony domestic violence offenders were more likely than any other group to commit a subsequent violent felony, and people convicted of multiple domestic violence *misdemeanors* were also prone to commit subsequent violent felonies—with rates comparable to criminals who have been convicted of multiple felony assaults.[19] Similarly, an Everytown for Gun Safety analysis of every mass shooting in the United States between January 2009 and July 2015 found that, in at least twenty-one of those 133 shootings (16%), the shooter had previously been charged with a crime of domestic violence.[20]

II. Petitioners' Interpretation of § 922(g)(9) Would Defeat the Purpose of the Lautenberg Amendment and Upend the State and Federal Regulatory Regime.

The federal Gun Control Act "long prohibited possession of a firearm by any person convicted of a felony." *Hayes*, 555 U.S. at 418. In 1994, Congress expanded the list of firearms disqualifications by adding a prohibition against the possession of a firearm by any person "who is subject to a court order that restrains such person from harassing,

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[18] Washington State Institute for Public Policy, *Washington's Offender Accountability Act: Department of Corrections' Static Risk Instrument* (Mar. 2007), *supra* note 6.

[19] *Id.*

[20] Everytown for Gun Safety, *Analysis of Mass Shootings* (Aug. 20, 2015), www.everytownresearch.org/reports/mass-shootings-analysis.

stalking, or threatening an intimate partner or child." 18 U.S.C. § 922(g)(8). Despite those provisions, the federal firearm ban did not adequately reach domestic abusers, in part because domestic violence offenses were either charged as, or pleaded down to, misdemeanors, allowing dangerous abusers to avoid the prohibition triggered by a felony conviction. *See Hayes*, 555 U.S. at 428 (citing 142 Cong. Rec. 22,985 (1996) (statements of Sen. Lautenberg)). In 1996, Congress sought to close that "dangerous loophole," *id.* (quoting 142 Cong. Rec. at 22,986), when it extended the gun possession prohibition to include persons "convicted of a misdemeanor crime of domestic violence," § 922(g)(9). As Senator Lautenberg explained on the Senate floor:

> Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, Mr. President, most of those who commit family violence are never even prosecuted. When they are, one-third of the cases that would be considered felonies, if committed by strangers are, instead, filed as misdemeanors. The fact is, that in many places today, domestic violence is not taken as seriously as other forms of criminal behavior. Often, acts of serious spouse abuse are not even considered felonies.

142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statements of Sen. Lautenberg). To ensure that both

problems were addressed, Congress enacted § 922(g)(9) as a broad, "zero tolerance," "no margin of error" prohibition on the possession of firearms by those with any conviction of a misdemeanor involving domestic abuse.[21] *Id.* at S8831-32. The purpose of the Lautenberg Amendment, therefore, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife."[22] *Hayes*, 555 U.S. at 427.

"[A] misdemeanor crime of domestic violence" is defined as an offense that (1) "is a misdemeanor under Federal, State, or Tribal law," (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,"[23] and (3) is committed by a person whose relationship to the victim is defined by the statute. 18 U.S.C.

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[21] "This amendment, very simply, would establish a policy of zero tolerance when it comes to guns and domestic violence. The amendment would prohibit *any* person convicted of domestic violence from possessing a firearm. There is no margin of error when it comes to domestic abuse and guns. A firearm in the hands of an abuser all too often means death. By their nature, acts of domestic violence are especially dangerous and require special attention." 142 Cong. Rec. S10377-78 (daily ed. Sept. 12, 1996) (statements of Sen. Lautenberg) (emphasis added).

[22] *See* 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (stating the purpose of the amendment was "[t]o prohibit persons convicted of a crime involving domestic violence from owning or possessing firearms").

[23] "[Section] 922(g)(9) is the product of a legislative compromise. The provision originally barred gun possession for any 'crime of domestic violence,' defined as any 'felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment.' Congress rewrote the provision to require the use of physical force in response to the concern 'that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors[.]" *Castleman*, 134 S. Ct. at 1415-16 (citations omitted).

§ 921(a)(33)(A). Of the three elements of the statutory definition, "*none* specifies a particular—or minimum—*mens rea*." *United States v. Booker*, 644 F.3d 12, 18 (1st Cir. 2011) (emphasis added). By not limiting application of the new firearm prohibition to statutes requiring any particular *mens rea*, Congress ensured that state charging practices and variations in state misdemeanor definitions did not impede its goal of disarming domestic abusers nationwide.

Had Congress intended to include a particular or minimum *mens rea*, it clearly knew how to do so, because it included such a requirement in the provision that directly preceded the Lautenberg Amendment. The text of what was ultimately enacted as § 922(g)(9) was passed as part of the Omnibus Consolidated Appropriations Act of 1997. *See United States v. Hartsock*, 347 F.3d 1, 4 (1st Cir. 2003). The provision enacting § 922(g)(9) is found at § 658 of that Act. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372. The provision that directly preceded it amended 18 U.S.C. § 922(q), which made it "unlawful for any individual *knowingly* to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." Pub. L. No. 104-208, § 657, 110 Stat. at 3009-370 (emphasis added). The juxtaposition of §§ 657 and 658, therefore, demonstrates that Congress could have specified a *mens rea* requirement for misdemeanor crimes of domestic violence had it wanted to. The fact that Congress chose not to is a clear signal of Congress's intent that § 922(g)(9) encompass all misdemeanor domestic violence crimes, whether inflicted intentionally or recklessly. *DePierre v. United States*, 131 S.Ct. 2225, 2234 (2011) (noting that, generally "when the legislature uses certain language in one part of the

statute and different language in another, the Court assumes different meanings were intended." (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004))).

It was the drafters' view that all convicted domestic abusers—including those who have committed misdemeanors—are dangerous. *See* 142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statements of Sen. Lautenberg) (explaining that the amendment, "[i]n simple words," says that "wife beaters and child abusers should not have guns"). To exclude convictions based on recklessness would create a hierarchy of domestic violence crimes, leaving a limited number of "misdemeanor crimes of domestic violence" as predicate acts for purposes of § 922(g)(9). That is precisely the scenario Congress sought to avoid by enacting the Lautenberg Amendment. In enacting § 922(g)(9) to "'close [a] dangerous loophole'" in federal gun laws, *Castleman*, 134 S. Ct. at 1409, Congress intended to keep guns out of the hands of *all* individuals who had been convicted of committing violence against intimate partners and other domestic relations, regardless of whether that violence was classified as a misdemeanor or a felony. And Congress wrote a law that does precisely that. This Court should decline Petitioners' invitation to rewrite our federal gun laws—and severely undermine public safety—by excluding "recklessness" crimes from § 922(g)(9)'s scope.

III. Petitioners' Interpretation of § 922(g)(9) Would Allow Domestic Violence Misdemeanants in at Least Thirty-Five Jurisdictions to Legally Possess Guns.

This Court should not exclude reckless misdemeanor crimes of domestic violence from the reach of § 922(g)(9) because doing so would be contrary to the purpose of the Lautenberg Amendment and would have significant negative consequences for public health and safety. Excluding from the definition of "misdemeanor crime of domestic violence" any offense with a *mens rea* that extends to recklessness would dramatically shrink the universe of crimes that count as predicate convictions for purposes of § 922(g)(9)—introducing a gaping loophole in the law in at least thirty-five jurisdictions and undermining Congress's decision to enact a federal solution to a national problem.

The prototypical predicate misdemeanor under § 922(g)(9) is a conviction for simple assault or battery. *See Castleman*, 134 S. Ct. at 1413. The Maine assault statutes under which Petitioners were convicted are substantively similar to the assault statutes in many other States, most of which have adopted an identical or nearly identical definition of "recklessness." If the Court adopts Petitioners' interpretation, far fewer convictions under these statutes would be predicate crimes for purposes of § 922(g)(9), and many more convicted domestic abusers would have legal access to firearms. This would be true regardless of whether those abusers were convicted based on intentional or reckless conduct.

Under Maine law, a person may be convicted of misdemeanor assault by "intentionally, knowingly *or recklessly*" causing "bodily injury or offensive physical

contact." Me. Rev. Stat. tit. 17-A, § 207 (emphasis added). That definition is similar to the Model Penal Code definition of simple assault. *See* Model Penal Code § 211.1(1)(a) (defining "simple assault" as *inter alia* "attempt[ing] to cause or purposely, knowingly *or recklessly* caus[ing] bodily injury to another") (emphasis added). It is also similar to both Federal law, which permits a misdemeanor assault conviction based on recklessness, *see* Resp. Br. at 19-20, 40-41, and to the law as it existed at the time the Lautenberg Amendment was enacted in an overwhelming majority of other jurisdictions—thirty-four States and the District of Columbia—which also permit a misdemeanor assault conviction with a *mens rea* of recklessness or its equivalent, *see* Resp. Br. App. B at 7a-19a (listing, by State, statutes that permit conviction for misdemeanor assault with a *mens rea* of recklessness or a lesser mental state).

Most of these States define "recklessness" in the same terms, or nearly the same terms, as Maine does. Under Maine law, recklessness includes acts that involve a "conscious[] disregard [of] a risk that the person's conduct will cause" such a result. Me. Rev. Stat. tit. 17-A § 35. The statute further requires that the disregard be a "gross deviation from the standard of conduct" followed by a reasonable person in that situation. *Id.* The Model Penal Code definition is essentially the same. Model Penal Code § 2.02(2)(c) (recklessness requires conscious disregard of risk that is a "gross deviation from the standard of conduct that a law-abiding person would observe"). The law of simple assault and battery in those jurisdictions has not materially changed since 1996, and today, those jurisdictions are home to nearly 190 million Americans. *See* U.S. Census Bureau, *Population*

Estimates, State Totals: Vintage 2015 (Dec. 22, 2015), www.census.gov/popest/data/state/totals/2015.

Thus, Congress's decision to include misdemeanor crimes of domestic violence within the scope of § 922(g)(9) implies the decision to include reckless conduct within its scope as well. It is presumed that Congress, when it enacts legislation, "is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *see also Cannon v. Univ. of Chic.*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . ."). It is untenable to conclude that Congress, in crafting a federal solution to a nationwide problem, would have enacted a statute that would be a "practical nullity," *Castleman*, 134 S. Ct. at 1418-19. Nothing in the text, history, or context suggests that Congress intended the Lautenberg Amendment to be so narrow.

Moreover, at the time that the Lautenberg Amendment was passed, one factor differentiating between misdemeanor and felony assault offenses in certain States was the *mens rea* requirement. For instance, in Maryland, in order to convict a person of felony assault, a prosecutor must prove intentional conduct, but the required showing for a misdemeanor conviction is only recklessness. *See* Md. Code Ann. Crim. Law §§ 3-202 (felony statute), 3-203(a) (misdemeanor statute); *Johnson v. State*, 115 A.3d 668, 673 (Md. Ct. Spec. App.) ("Assault is causing offensive physical contact to another person" that "was the result of an intentional or reckless act of the defendant and was not accidental.") (citations omitted), *cert. denied*, 122 A.3d 975 (Md. 2015) (Tbl.). The same is true of Ohio, where felony assault

required in 1996—as it does today—at least knowing conduct, but misdemeanor assault may be proved with evidence of recklessness. *See* Ohio Rev. Code Ann. §§ 2903.11 (A) (felony statute); § 2903.13 (A), (B) (misdemeanor statute). While *mens rea* is not necessarily the dividing line between felonies and misdemeanors, *see* Resp. Br. at 47, § 922(g)(9)'s effectiveness would be restricted by ignoring state-law distinctions like these.

Accepting Petitioners' invitation to exclude from the scope of § 922(g)(9) offenses that extend to reckless conduct would frustrate Congress's intent under either of the two prevailing approaches to determining whether a predicate conviction is a "misdemeanor crime of domestic violence." Under the so-called "categorical approach," a court "consider[s] the offense generically, that is to say, [it] must examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). Accordingly, a conviction is assumed to be based on the least severe conduct described by the statute. *Hoodho v. Holder*, 558 F.3d 184, 189 (2d Cir. 2009). Thus, if an individual is convicted under a domestic violence statute that criminalizes intentional, knowing, and reckless conduct, the offense would be deemed to rest on recklessness, regardless of the actual facts. Under Petitioners' interpretation, abusers convicted under statutes requiring application of the categorical approach would no longer be subject to § 922(g)(9). Such a result would gut the protections offered by those state statutes and allow many convicted domestic abusers—including those who engaged in knowing or intentional conduct, as well as those who engaged in reckless conduct—legal access to firearms.

The result is unacceptable even when a misdemeanor domestic violence statute may be analyzed under a modified categorical approach. A modified categorical approach can be applied only when (1) a defendant was convicted under a "divisible" statute and (2) certain categories of judicial records contain facts sufficient to identify the relevant conduct underlying the conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). A statute is divisible if the elements of a statute of conviction are stated in the alternative, such that the offense in fact "comprises multiple, alternative versions of the crime." *Id.* at 2284.[24] The "modified categorical" approach requires application of a "highly technical" framework to the facts of a case, *id.* at 2295 (Alito, J., dissenting), based on a limited and circumscribed set of documents. A court may consider certain facts underlying the prior conviction only for which there is "adequate judicial record evidence" (so-called "*Shepard*" documents) rather than just the legal definition of the offense. *Shepard v. United States*, 544 U.S. 13, 16 (2005). That approach is "not always easy to apply." *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).

A conviction for intentional or knowing conduct under a divisible statute *could* be a § 922(g)(9) predicate under Petitioners' interpretation, but determining whether it was would require a "highly technical" analysis specific to each conviction. The States' different formulations of the *mens rea* element of their assault statutes (including common law formulations that do not use the word "reckless") do

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[24] On January 19, 2016, the Court granted the petition for a writ of certiorari in *Mathis v. United States*, No. 15-6092, to resolve a circuit split over the conditions under which a statute is divisible.

not easily permit black-and-white determinations. Additionally, in many instances—as in Petitioners' cases—there will not be adequate *Shepard* documents. Thus, it will be impossible for a court to conclude that a particular conviction qualifies as a predicate offense under § 922(g)(9)—even when the conviction, in fact, involved knowing or intentional conduct. Inserting additional complexity into an already difficult analysis will increase the likelihood that individuals, who Congress intended to prohibit from possessing guns, will be legally permitted to do so.

The administrative complexities of a modified categorical approach would hamstring NICS, on which the federal government and the States rely to keep guns out of the wrong hands. Pursuant to 18 U.S.C. § 922(t)(1), any person convicted of a "misdemeanor crime of domestic violence" is prohibited from possessing firearms, and this prohibition is enforced through a NICS background check conducted by a licensed firearm dealer.[25] Whenever a NICS background check determines that transfer of a firearm to a would-be gun buyer would cause a violation of § 922(g), NICS instructs the dealer to deny the sale.[26] 18 U.S.C. § 922(g). Thus, it is crucial that

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[25] Section 922(g)(9) prohibits a person convicted of a predicate offense from possessing a firearm. But there is no federal law that requires disqualified persons to surrender their firearms to government authorities, and the relevant state laws vary significantly. *See* Everytown for Gun Safety, *Guns and Violence Against Women: America's Uniquely Lethal Domestic Violence Problem* (2014), www.everytownresearch.org/documents/2015/04/guns-and-violence-against-women.pdf.

[26] *See* Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System* (May 2015), www.fbi.gov/about-us/cjis/nics/general-information/nics-overview-brochure. In 2014, NICS prevented more than 6,000

NICS function effectively, which in turn requires that all prohibiting records be properly reported in NICS, and that any such record in the system trigger a denial whenever a background check is run in association with an attempted gun purchase.[27] But NICS is already overwhelmed by a "perfect storm" of record gun sales and understaffing.[28] Adopting Petitioners' position would exacerbate the problem. It would require NICS to employ the "modified categorical" approach in many cases to discern the *mens rea* of the

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transactions that were prohibited by reason of a misdemeanor crime of domestic violence conviction. Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System (NICS) Operations 2014*, 18 (2014), www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report. Since inception, federal use of NICS has prevented the purchase of guns by individuals previously convicted of a misdemeanor crime of domestic violence more than 110,000 times. *Id.* The number is significantly higher when state-level data is included as well. Between 1999 and 2010, state and local agencies denied approximately 144,000 purchase applications because of a conviction for a misdemeanor crime of domestic violence. *See* Bureau of Justice Statistics, DOJ, *Background Checks for Firearms Transfers, 2010-Statistical Tables*, Table 2 (Feb. 2013) www.bjs.gov/content/pub/pdf/bcft10st.pdf. Currently, NICS includes at least 112,000 records for misdemeanor crimes of domestic violence. Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System (NICS) Operations 2014*, supra note 26 at 25.

[27] *See* GAO, Gun Control Opportunities to Close Loopholes in the National Instant Criminal Background Check System, 19-22 (July 2002), www.gao.gov/assets/240/235091.pdf (describing challenges in determining whether convictions reported in NICS are prohibitive.

[28] *See* Kevin Johnson, *FBI Official: "Perfect Storm" Imperiling Gun Background Checks*, USA Today, Jan. 20, 2016, www.usatoday.com/story/news/nation/2016/01/19/fbi-guns-background-checks/78752774.

particular defendant and its significance under the specific statute. But missing details in the records of many domestic assault misdemeanor convictions will preclude NICS from determining whether a conviction qualifies as a prohibiting misdemeanor crime of domestic violence within the three-day window allowed under the background check law. And individuals Congress sought to prohibit from purchasing firearms will be permitted to do so.[29] Such a result would violate Congress's intent to establish a straightforward regime and eviscerate its "zero tolerance" policy.

Eviscerating § 922(g)(9) in thirty-five jurisdictions would be particularly unworkable in light of the national nature of the problem of illegal firearms. Guns are easily transported across State lines from States with weak gun laws into States with stronger laws.[30] In light of this reality, Congress determined

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[29] Allowing firearms sales to proceed when a background check cannot be completed within three days can have tragic results: it was because NICS agents could not be resolve his background check within the three-day window that Dylan Roof was permitted to purchase the .45-caliber handgun he allegedly used to kill nine people at an evening Bible study in downtown Charleston, South Carolina in June 2015. *Id.*

[30] Mayors Against Illegal Guns, *Trace the Guns, The Link Between Gun Laws and Interstate Gun Trafficking*, 4, 29 (Sept. 2010), http://tracetheguns.org/report.pdf (reporting that, in 2009, more than 40,000 guns used to commit a crime were purchased across state lines, disproportionately in states with relatively less restrictive gun laws); *see also* Brian Knight, *State Gun Policy and Cross-State Externalities: Evidence from Crime Gun Tracing*, at 25 (Nat'l Bureau of Econ. Research, Working Paper No. 17469, 2011), www.princeton.edu/rppe/speaker-series/speaker-series-2011-12/Knight.pdf (concluding that "trafficking flows respond to gun regulations, with guns imported from states with weak gun laws into states with strict gun laws").

that federal legislation was necessary to effectively implement gun safety laws. Congress designed § 922 to serve as a federal baseline for categorically prohibiting the most dangerous types of criminal offenders—including domestic abusers who act recklessly or plead down to crimes of recklessness—from possessing firearms. 18 U.S.C. § 922. Excluding reckless misdemeanors from the scope of § 922(g)(9) would allow many convicted domestic abusers to legally skirt this prohibition. It would also fly in the face of Congress's stated purpose in passing the Lautenberg Amendment.

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

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No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE, *et al.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc. and Gun Owners of California are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, as well as related issues.

Many of these organizations have filed *amicus curiae* briefs in other cases interpreting the scope and application of the misdemeanor crime of domestic violence ban of 18 U.S.C. § 921, including filing an

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae brief in United States v. Castleman, 572 U.S. __, 134 S.Ct. 1405 (2014).[2]

SUMMARY OF ARGUMENT

In the court of appeals below, dissenting Judge Juan Torruella — although a strong political supporter of the Lautenberg Amendment — nevertheless urged his panel colleagues to lay aside their personal views on "domestic violence" and "gun violence," and to do their duty as judges: to say what the law actually is, not what they might wish it to be. But Judge Torruella not only critiqued his fellow circuit court judges, but also this Court's Castleman reasoning, opposing any extension of the Lautenberg Amendment beyond what it already has done in United States v. Castleman. *See* United States v. Voisine, 778 F.3d 176, 217 (1st Cir. 2015) (J. Torruella, dissenting).

Not only did the panel majority below reject Judge Torruella's counsel, but it threw caution to the wind. Anchoring its analysis to one of the many social science reports that the Castleman Court claimed to have motivated Congress's adoption of the Lautenberg Amendment, the court below erroneously broadened an already overextended definition of a Misdemeanor Crime of Domestic Violence ("MCDV"). Indeed, had the panel below conducted a survey of the social science literature cited by the Castleman Court to have contained the "sobering facts" upon which Congress relied to enact the Lautenberg Amendment, it would

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[2] http://www.lawandfreedom.com/site/firearms/Castleman GOF Amicus Brief.pdf.

have discovered that, except for a snippet from a law review article dated 1987 and a modicum of information from a study dated 1996, all of the other social science data appeared in reports dated from 2000 to 2013, well after 1996 when the Lautenberg Amendment was passed.

To be sure, the Castleman Court did also rely upon a remark made by Senator Wellstone on the floor of the Senate in 1996, but on the whole it found that the legislative history, composed largely of senatorial statements supporting a narrower definition of a MCDV, "unpersuasive." Dismissing the statements of Senator Lautenberg and his fellow senators as "isolated references," the Castleman majority displaced the actual legislative history for a manufactured one through judicial usurpation of the legislative process.

As Justice Scalia pointed out in his concurring opinion, the Castleman majority based its decision primarily upon data gleaned from two *amicus curiae* briefs, and in so doing, assumed the role of a congressional committee or subcommittee, and then the Congress as a whole, fashioning a definition of "physical force" that conformed to the Court's policy choice, ignoring the MCDV text, and other related statutes. Not only that, but the Castleman Court adopted a definition readily amenable to the changing societal mores of family groupings and sexual behaviors, and thus, posing a significant threat to the constitutional right to keep and bear arms.

As dangerous as the Castleman rule is to the Second Amendment, any extension of that rule, such as the one made by the court of appeals below, should cause this Court to apply the constitutional-doubt canon of interpretation. This canon is of particular importance here because of the singular fact that there is apparently only one right in the federal Bill of Rights — the Second Amendment — that can be presumably lost to a person because of a misdemeanor, and one not involving a firearm or any real threat of physical violence. As a preexisting right, the right to keep and bear arms ought to enjoy the same stature as other inalienable rights, most notably, the freedoms of religion, speech, press, assembly, and petition. None of these First Amendment freedoms are lost as a result of being convicted of a crime. As it is true of the First, so it should be true of the Second. Both are equally privileges and immunities of United States citizenship that can only be lost by renunciation of citizenship status.

ARGUMENT

I. THE CASTLEMAN DEFINITION OF "PHYSICAL FORCE" IS ILLEGITIMATE, RESTING UPON A CORRUPT DECISIONAL PROCESS.

In a remarkable display of judicial candor, Judge Juan Torruella observed below that he "shared" the "grave concerns" of, and "strongly agree[d] with th[e] [laudable] purposes" of the "Lautenberg Amendment," as articulated by the First Circuit panel majority and by the Supreme Court in United States v. Castleman,

572 U.S. __, 134 S.Ct. 1405 (2014). But, he cautioned: "This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence." United States v. Voisine, 778 F.3d 176, 216 (1st Cir. 2015) (Torruella, J., dissenting).

"Were our job so simple," Judge Torruella continued, "it would be an easy matter to decide in favor of the government." *Id.* But, he concluded:

> that is not our role. Our judicial obligations preclude us from such results-oriented decisionmaking.
>
> Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation. This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends. [*Id.*]

No doubt the immediate targets of Judge Torruella's remarks were his two colleagues on the panel below. Indeed, Judge Sandra Lynch opened her majority opinion by sounding a very different judicial trumpet:

> Our answer is **informed** by congressional recognition in §922(g)(9) of the special risks posed by firearm possession by domestic abusers. "Domestic violence often escalates in

> severity over time ... and the presence of a firearm increases the likelihood that it will escalate to homicide...." *Castleman*, 134 S.Ct. at 1408. [*Id.* at 177 (emphasis added).]

It would surprise no one that Judge Lynch plucked this tidbit of social science from Castleman as her deliberative premise, following the lead of the Castleman majority before her:

> Recognizing that "[f]irearms and domestic strife are a potentially deadly combination," ... Congress forbade the possession of firearms by anyone convicted of "a misdemeanor crime of domestic violence." [*Id.* at 1408.]

Judge Lynch cherry-picked from Castleman this single social science "finding" calculated to give the circuit court panel an even wider scope of the Lautenberg Amendment's reach than the one already crafted by the Castleman Court. And she employed the same tactic used by the Castleman Court: to make it appear as if the social science data — gleaned from the "domestic violence" and "gun control" literature by the Castleman Court — had been before Congress in 1996 when it enacted the MCDV prohibition into law. However, the truth is, except for two items, the data relied upon in Castleman were not before the nation's lawmakers.

A. The Castleman Definition of "Physical Force" Rests Upon a Corrupted Premise.

In addition to the above assertion relied upon by Judge Lynch, the Castleman Court asserted that:

- "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year."

- "'When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed.'"

- "'[A]ll too often,' as one Senator noted during the debate over § 922(g)(9), 'the only difference between a battered woman and a dead woman is the presence of a gun.'"

- "[There were] 1,259,390 incidents of domestic violence in 2012."

- "[V]iolence among intimate partners caused deaths of 1,247 women and 440 men in 2000." [*Id.* at 1409.]

Immediately after setting out this list, and specifically referring to it, the Castleman majority stated, as a matter of fact, that "Congress **enacted [the MCDV ban] in light of these sobering facts**, to '"close [a] loophole'" in the gun control laws...." *Id.* at 1409 (emphasis added). Contrary to that assertion, however, such purported facts were most definitely not before Congress in 1996.

In 1996, the year in which Congress enacted the MCDV ban, Congress could not have known the number of deaths caused by violence four years later in 2000; nor could Congress have envisioned the number of incidents of domestic violence that would emerge 16 years later in 2012, as the Court asserted in footnote 1. *Id.* at 1409. As for the social science data that an abused woman was 6 times more likely to be killed "when a gun was in the house," and that there were "more than a million acts of domestic violence, and hundreds of deaths," such information appeared later in reports dated 2000 and 2003, published four and seven years, respectively, after Congress enacted the MCDV ban. *See id.* at 1409 and Georgia v. Randolph, 347 U.S. 103, 117-118 (2006).

As for the data relied upon by Judge Lynch, the statement that "[d]omestic violence often escalates in severity over time" is found in two *amicus curiae* briefs filed in Castleman. The data in one of those briefs were drawn from reports dated 2006, 2000, and 2003, as cited in that order.[3] The data in the other brief came from reports dated 2005 and 2000, supplemented by a single mention from a law review article published in 1987, and by information contained in a report dated 1996 — but without any supporting information or evidence that either had been considered by Congress in 1996.[4] The statement that

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[3] *See* Brief *Amici Curiae* of Major Cities Chiefs (Nov. 22, 2013) at 13-15.

[4] *See* Brief *Amici Curiae* of the National Network to End Domestic Violence (Nov. 22, 2013) at 9-12.

"the presence of a firearm increases the likelihood that it will escalate to homicide" appears to have been derived from reports dated 2003, 2013, 2002, and 2004.[5]

In short, with perhaps two exceptions, it would not have been possible for Congress to have known any of the "sobering facts" that, according to the Castleman majority, motivated that federal legislative body "to '"close [a] dangerous loophole"' in the gun control laws.'" To be sure, at the time of the passage of the MCDV ban, Senator Wellstone's rhetorical flourish must have been heard by his colleagues on the Senate floor. However, Senator Wellstone's hyperbole — that "the only difference between a battered woman and a dead woman is the presence of a gun"[6] — would hardly merit the appellation of a "fact," no matter how "sobering" an impact it may have had on the "debate," nor however suited it may have been to the judicial task at hand — unpacking the meaning of "use ... of physical force" in the definition of the MCDV ban.

B. The Castleman Definition of "Physical Force" Was Manufactured through a Judicial Usurpation of the Legislative Process.

At the close of the Castleman majority opinion, the majority justices shunned the senatorial "debate" in the shaping of its interpretation of the meaning of "the

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[5] *See id.* at 14-15.

[6] Castleman at 1409.

use ... of physical force." In response to Castleman's appeal to "legislative history[,] suggest[ing] that Congress could not have intended for the provision to apply to acts involving minimal force," the Castleman majority found the several remarks of senators who supported the MCDV ban "unpersuasive." Castleman at 1415. Despite the fact that the Castleman Court acknowledged that "several Senators argued that the provision would help to prevent gun violence by perpetrators of severe domestic abuse," the Court concluded that "these Senators' **isolated references** to severe domestic violence [do not prove that they] would not have wanted § 922(g)(9) to apply to a misdemeanor assault conviction like Castleman's." *Id.* (emphasis added). Among the Senators whose remarks the Court characterized as an "isolated reference[]" was that of Senator Wellstone, who was reported to have said that the MCDV ban "would help to prevent gun violence ... by ... people who '**brutalize**' their wives or children." *Id.* (emphasis added).

Yet, as noted above, the Castleman majority previously cited another of Senator Wellstone's remarks — that "'the only difference between a battered woman and a dead woman is the **presence** of a gun'" — as one of those "sobering facts" that prompted Congress to "'"close [a] dangerous loophole'" in the gun control laws." *Id.* at 1409 (emphasis added).[7]

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[7] Could the difference between the two Wellstone remarks be that the latter supported a smaller opening for lawful possession of firearms, whereas the former would have allowed more people to retain their right to keep and bear arms?

One would think that if the Castleman Court were really interested in the "extent that legislative history can aid in the interpretation of [a] statute," as it said it was, then the majority would have searched the Congressional record for all relevant statements, including those revealing the Senate's more narrow focus on violence — such as Senator Lautenberg's reference to "serious spousal or child abuse" or "violent individuals." *See id.* After all, Senator Lautenberg, after whom the MCDV ban was named and its most prominent sponsor, had a great deal more to say about the ban than these hand picked by the Castleman majority, and as recited by the court of appeals below. Voisine at 183.

However, focused on the social science studies of "domestic violence" and "gun violence," the Castleman majority appeared to be uninterested in finding out what really transpired on the Senate floor or, for that matter, anywhere else in the nation's legislative halls. As Justice Scalia correctly pointed out in concurrence, the majority showed no interest in conducting a careful textual or contextual analysis of the MCDV ban language.

Instead, as Justice Scalia maintained, the majority "base[d] its definition on an *amicus* brief ... and two publications issued by the Department of Justice's Office on Violence Against Women." *Id.* at 1420-21 (Scalia, J., concurring). In purpose and by effect, the Castleman majority acted as if it was part of Congress, treating the *amici* as if they were appearing before a legislative committee in support of legislation to be enacted into law. As Justice Scalia observed, these

amici provided "such a wide range of nonviolent and even *nonphysical* conduct that they cannot possibly be relevant to the meaning of a statute requiring 'physical force,' or to the legal meaning of 'domestic violence' (as opposed to the meaning desired by private and governmental advocacy groups)." *Id.* at 1421.

Although the Castleman majority purported to find that "Congress incorporated the common-law meaning of 'force' — namely, offensive touching — in § 921(a)(33)(A)'s definition of a [MCDV]," Justice Scalia rightfully established that the majority's "expansive common-law definition cannot be squared with relevant precedent or statutory text." *Id.* at 1418-19.

C. Castleman Did Not Produce a Fixed Rule of Law of Physical Force, But Rather an Evolving Behavioral Standard That Will Change with Changing Times.

As dissenting Circuit Judge Torruella points out, under Maine law, an "offensive" touching may be "effected by indirect touchings (*e.g.*, the touching of items intimately connected to the body, such as clothing or a cane ...)" so long as a "reasonable person would find the physical contact to be offensive, under the particular circumstances involved." Voisine at 206. Although such a standard might make sense as a matter of tort law, it is highly questionable whether such an amorphous standard suffices as a matter of criminal law. *Id.* at 206-08. To that end, Judge Torruella notes that the Model Penal Code "limit[s] battery to instances of physical injury and cover[s]

unwanted sexual advances by other statutes." *Id.* at 207-08. And for good reason. Community standards respecting what may be tortiously or criminally "offensive," while subject to the traditional standard of reasonableness, necessarily fluctuate with changing times. This is particularly true in contemporary America in the area of family life and sexual relationships. What is permissible yesterday has become impermissible today, and vice-versa. Who knows what the standard of "offensiveness" will be tomorrow?

Additionally, the change of sexual mores in society has been accompanied by proliferation of advocacy groups. And with those groups have come, as Justice Scalia pointed out in his Castleman concurrence, "capacious" and "unconventional" definitions of "domestic violence" that are so extensive that almost anything that subjectively offends would qualify, even to the extent that "everything is domestic violence," thereby necessitating the coining of a new word "to denote actual domestic *violence*." *See id.* at 1421.

Coupling these widespread changes in societal relationships with a judicial penchant for change,[8] newly discovered rights proliferate, while pre-existing rights suffer from evolving standards at the hands of a judiciary that has long abandoned the notion that law, if it is to be law, must be fixed regardless of time, not malleable in the hands of jurists willing to indulge their own personal and policy agendas. *See* A. Scalia

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[8] *See, e.g.*, Obergefell v. Hodges, 576 U.S. __, 135 S.Ct. 2584 (2015).

& B. Garner, Reading Law at 403-410 (West: 2012). As Judge Torruella observed in the court of appeals below, it is time for this Court to return to its judicial task of "statutory interpretation" (Voisine at 216), and in this case, to an interpretation of a statute that bears heavily against petitioners' constitutional right to keep and bear arms.

II. A BROADENED CASTLEMAN RULE WOULD ILLEGITIMATELY DEPRIVE PETITIONERS OF THEIR INALIENABLE RIGHT TO KEEP AND BEAR ARMS.

This Court rejected Castleman's plea "to read § 922(g)(9) narrowly because it implicates his constitutional right to keep and bear arms." *Id.* at 1416. The Court declined Castleman's invitation, because he "has not challenged the constitutionality of § 922(g)(9), either on its face or as applied to him." *Id.* Such is not the case here, since petitioners challenged the Maine statute under which he was convicted on the ground that, as applied to them, the statute deprived them of their Second Amendment rights. *See* Voisine, 778 F.3d at 186. Although the grant of certiorari does not include review of this claim, petitioners' claim that this Court should read § 922(g)(9) narrowly because the broader reading urged by the Government "implicates [their] constitutional right to keep and bear arms" requires, unlike Castleman, more than a "cursory nod to constitutional avoidance concerns." Castleman at 1416. Thus, those concerns must be addressed. *See* Reading Law at 247-51.

As Justice Scalia's concurrence warned, it is one thing for a government agency to employ a "capacious" definition of "domestic violence," in a "'health care setting.'" *Id.* at 1421 and n.9. It is quite another to adopt such a broad reading in a criminal prosecution. *Id.* This concern is especially important in relation to the right to keep and bear arms, in that it is the only individual right in the federal bill of rights that may be presumably forfeited by criminal or other behavior defined by the Government. In District of Columbia v. Heller, 554 U.S. 570 (2008), this Court opined that the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" were "presumptively lawful." *Id.*, 554 U.S. at 626-627 n.26. Would the same be presumptively true of the First Amendment freedoms of religion, speech, press, assembly, and petition? Of course not. Although such First Amendment freedoms may be severely limited while one is incarcerated, they are not totally lost. In contrast, for example, unless an MCDV conviction is expunged or set aside, or unless the person has been pardoned or otherwise restored to his civil rights, the Second Amendment **right** to keep and bear arms is lost forever. *See* 18 U.S.C. § 921(a)(20) and (33).

A. As Citizens, Petitioners Possess the Second Amendment Right.

Heller put to an end the absurd idea that the Second Amendment secures only a "collective," not an individual, right. Heller, 554 U.S. at 595. Indeed, even the dissenting justices agreed that the Amendment protects the individual right "to use weapons for certain military purposes." *Id.* at 636.

Heller also made clear that the Second Amendment individual right inures to the "People," that is, those persons who are part of the national political community — American citizens — not to any person who may happen to be on American soil, such as those on a tourist or student visa. *Id.* at 579-81. Thus, the right "is [to be] exercised individually and belongs to **all Americans.**" *Id.* at 581 (emphasis added).

Any other reading as to whose rights were protected would have brought the operative clause into conflict with the Second Amendment's prefatory clause. As Heller confirmed, the prefatory clause — "A well-regulated Militia, being necessary to the security of a free state" — "announces [the] purpose" of the second, or operative, clause: "the right of the people to keep and bear arms, shall not be infringed." *Id.* at 576-77. As a statement of purpose, the prefatory clause is there to "clarify" — "to resolve an ambiguity in the operative clause": "Logic demands that there be a link between the stated purpose and the command." *Id.* at 577.

According to Heller, the purpose stated in the prefatory clause is "to secure the ideal of a **citizen** militia." *Id.* at 599 (emphasis added). The operative clause was settled on as the best way to accomplish this purpose because "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the **people's** arms, enabling a select militia or standing army to suppress **political opponents.**" *Id.* at 598 (emphasis added).

Logic demands, then, that the Second Amendment be understood as securing the individual right of **citizens** — "'the people composing [the American] nation or community'" — to keep and bear arms. *See id.* at 597.[9] An alien is not comprehended by the nation's charter as part of the "the people" entitled to "dissolve the political bands which have connected them with another," or "to alter or to abolish [the current form of Government] and to institute a new Government." Declaration of Independence. And no such person is comprehended by "We the People" of the Constitution's Preamble, nor endowed with "the powers [of] the people" secured by the Tenth Amendment of that document.

B. A Right of Citizenship Cannot Be Involuntarily Divested.

Even though misdemeanants, as American citizens petitioners remain part of the national polity. Unless the government can affirmatively demonstrate that, because of their misdemeanor convictions, petitioners may be deprived of a right that would otherwise belong to them as citizens of this country, petitioners remain among the "people" protected by the Second Amendment. The court of appeals below ruled otherwise, concluding:

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[9] Although an alien traveling as a tourist, studying at an American university, or possessing a temporary work visa, or even an illegal alien, may exercise the same common law or statutory right of self-defense or firearms ownership as any American, no such alien could legally claim protection of the Second Amendment, for he is not part of "the people."

> Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence from firearm possession in other contexts. [Voisine at 187.]

Such rationalization is reminiscent of the reasoning that animated the English Bill of Rights of 1689, which limited the right to keep and bear arms to Protestants, and thus, permitted the "disarm[ing of] Roman Catholics — 'for the better secureing their Majestyes Persons and Government." *See* K. Marshall, 32 HARV. J. OF L. & PUB. POL. 695, 721-22 (2009). Indeed, the government's purported concern for community safety is not dissimilar to the concerns underpinning the Black Codes, which deprived United States freedmen of their right to keep and bear arms. *See* R. Cottrol and R. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," 80 GEO. L. J. 309, 344-46 (Dec. 1991).[10]

The privileges and immunities of United States citizenship, however, are not subject to involuntary divestiture by the United States Government. In Afroyim v. Rusk, 387 U.S. 253, 257 (1967), the Supreme Court ruled that United States citizenship,

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[10] Some observers have even claimed that modern gun control was motivated in part by fear of black radicals and urban violence. *See* R. Sherill, The Saturday Night Special 280 (Penguin Books: 1973) ("The Gun Control Act of 1968 was passed not to control guns but to control blacks....")

once vested, may not be "take[n] away ... without [the citizen's] assent":

> [W]e reject the idea ... that ... Congress has any general power ... to take away an American's citizenship.... This power cannot ... be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country **the people are sovereign and Government cannot sever its relationship to the people by taking away their citizenship**. [*Id.* (emphasis added).]

If Congress has no power to strip away **all** of the privileges of a citizen then, quoting Chief Justice Marshall in Osborn v. Bank of the United States,[11] "[t]he constitution does not authorize Congress to ... **abridge** those rights." Afroyim, 387 U.S. at 261 (emphasis added). Furthermore, the Afroyim Court wrote:

> [W]hether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship.... There is no indication in these

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[11] 22 U.S. (9 Wheat.) 738, 927 n.22 (1824).

> words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. **Once acquired, this Fourteenth Amendment citizenship** was **not** to be shifted, canceled or **diluted** at the will of the Federal Government, the States, or any other governmental unit. [Afroyim, 387 U.S. at 262 (emphasis added).]

Thus, the Court concluded that Congress had adopted the citizenship clause in the Fourteenth Amendment "'to put this question of citizenship and **the rights of citizens ... beyond the legislative power.**" *Id.*, 387 U.S. at 262-63 (emphasis added).

The court of appeals below would have this Court disregard these principles, extending the MCDV disqualification as a salutary measure to "better ensure that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault." Voisine at 183. But by that logic, what principle would prevent the government from abridging, for example, First Amendment rights as well? Could the government deprive a citizen of his freedom to engage in a peaceable assembly on the ground that he previously had been convicted of disorderly conduct in relation to a public protest against an abortion clinic which, in Congress's predictive judgment, created serious dangers to the public peace and a woman's right to choose? According to the principles enunciated in Afroyim, the privileges

and immunities of United States citizenship can only be lost by a voluntary renunciation of citizenship, not by the commission of any act that Congress might consider sufficient to justify the deprivation of his privileges and immunities in the future.

C. Petitioners Have Not Forfeited Their Second Amendment Rights.

Even the Afroyim dissenters did not believe that Congress had plenary power to strip a citizen of his citizenship privileges. Rather, they concluded that Congress could take away a person's citizenship if that person engaged in an act that "indicate[d] a dilution of his allegiance to this country." *See* Afroyim, 387 U.S. at 268-69. According to the dissenting justices, such an act could be the basis upon which Congress could conclude that the person had "forfeited" his citizenship rights. *See id.*, 387 U.S. at 286.

Although such views have been determined to justify the deprivation of a citizen's right to vote based upon a conviction of certain felonies, as the Supreme Court ruled in Richardson v. Ramirez, 418 U.S. 24 (1974), such historical deprivations have been based upon criminal acts far removed from Voisine's having been convicted of a MCDV. A MCDV conviction does not implicate petitioners' patriotic allegiances, in contrast to an act of insurrection or treason or commission of a similar crime, such as was the case in Richardson. Moreover, in contrast to the right to keep

and bear arms, the right of a citizen to vote is not, *per se*, constitutionally secured.[12]

Nor is a MCDV conviction, as defined by the court below, historically linked to the commission of a felony at common law, justifying the forfeiture of one's standing as a citizen. According to Blackstone's Commentaries, a conviction of a common law felony "occasion[ed] a total forfeiture of either lands, or goods, or both." IV W Blackstone, Commentaries on the Laws of England, 95 (U. Of Chi. Facsimile ed., 1769). Under the feudal system, such a total forfeiture severed the felon not only from his land, but also the felon's connection to his Lord, and resulted in expatriation. *Id.* at 95-97. By contrast, a misdemeanor conviction did not produce any such "civil death." *See* K. Marshall, 32 HARV. J. OF L. & PUB. POL. at 714-15. Rather, a misdemeanor (in contrast to a felony), was concerned with only "smaller faults, and omissions of less consequence." Blackstone at 5.

Such distinctions among felonies, crimes, and misdemeanors prevailed in early America. Indeed,

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[12] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966). Rather, it is secured only against certain discriminatory criteria, such as race, sex, payment of a poll tax, and the age of 18. *See* Amendments 15, 19, 24, and 26, U.S. Constitution. Thus, Section 2 of the Fourteenth Amendment allows for the excepting of persons denied the elective franchise on account of "**rebellion or other crime,**" and various Acts readmitting the states of the confederacy allowed for disenfranchising persons for "**rebellion or for felony at common law.**" Richardson, 418 U.S. at 41-55 (emphasis added).

Noah Webster's 1828 Dictionary definition of "felony" — as "any crime which incurs the forfeiture of lands or goods" — is a verbatim quote from Blackstone. The definition of "misdemeanor" is likewise the same as Blackstone's. Thus, there is no historical justification for treating MCDV and felony convictions as functional equivalents with respect to the forfeiture of the right of a citizen to keep and bear arms. *See* H. Titus, "Second Amendment: Rule by Law or Judges?" 8 LIBERTY U. L. REV. 577, 600-04 (2014).

Indeed, there appears to be a serious question whether the commission of a felony — aside from treason and like offenses — could trigger forfeiture of any constitutionally secured citizenship right in the United States, a country where the feudal system never gained a foothold, but where sovereignty has always resided in an educated and God-fearing people. *See* K. Marshall, 32 HARV. J. OF LAW & PUB. POL. at 715-16. *See also* J. Adams, "A Dissertation on Canon and Feudal Law," reprinted in The Revolutionary Writings of John Adams, pp. 21-35 (Liberty Fund, Indianapolis: 2000) ("Rulers are no more than attorneys, agents, and trustees, for the people; and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed, and to constitute abler and better agents, attorneys, and trustees." (p. 28)).

Even assuming that petitioners could forfeit their right as American citizens to keep and bear arms on some grounds other than voluntary renunciation of citizenship, the court of appeals below has utterly

failed to recite any constitutionally legitimate ground upon which to deprive petitioners of such right.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF MAJOR CITIES CHIEFS AND THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS SUPPORTING RESPONDENT

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STATEMENTS OF INTEREST[1]

Major Cities Chiefs

The Major Cities Chiefs Association (MCCA) is a professional association of Chief police executives representing the largest cities in the United States, Canada and the UK. MCCA's membership comprises Chiefs and Sheriffs of the sixty-seven largest law enforcement agencies in the United States. It includes police executives heading the largest police departments in the United States, including Atlanta, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C., and many others, which protect roughly 40% of America's population. The Major Cities Chiefs Association has filed amicus briefs in numerous cases, including *District of Columbia v. Heller* (No. 07-290, Supreme Court of the United States of America), *Moore v. Madigan* (No. 12-1269, 7th Circuit), *Woollard v. Sheridan* (No. 12-1437, 4th Circuit), *Drake v. Filko* (No. 12-1150, 3rd Circuit), and *United States v. Castleman*, (No. 12-1371, Supreme Court of the United States of America).

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici curiae* further state that no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented.

International Brotherhood of Police Officers

The International Brotherhood of Police Officers (IBPO) is one of the largest police unions in the country, representing a significant number of members around the United States. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers. The International Brotherhood of Police Officers filed an amicus brief in *United States v. Castleman*, (No. 12-1371, Supreme Court of the United States of America).

SUMMARY OF THE ARGUMENT

The ruling of the First Circuit, if reversed, would frustrate the enforcement of 18 U.S.C. § 922(g)(9), which was enacted by Congress in response to the nationwide problem of firearms in the hands of domestic abusers. The First Circuit correctly recognized that in the unique context of domestic violence, recklessness fits within the meaning of 18 U.S.C. § 921(a)(33)(A)'s phrase "use or attempted use of physical force." This interpretation is consistent with Congressional intent, this Court's opinion in *United States v. Castleman*, 134 S. Ct. 1405 (2014), and public policy considerations.

Petitioners do not question the prevalence or the seriousness of domestic violence in this country. However, they seek to minimize the impact of reckless conduct and ignore the well-documented pattern by which a relatively minor engagement can rapidly escalate into a lethal one. The statistics speak for themselves. Over one million domestic

violence crimes occur every year in the United States. Domestic violence constituted 17% of total violent crimes in 2010 and at least half of intimate partner homicides in the United States are committed with firearms. The presence of a firearm dramatically increases the likelihood that an episode of domestic violence will result in death. Prosecution of offenders can be problematic, as victims are often unwilling to assist in prosecution of loved ones, or even deny violence on the part of the offender. A domestic abuser's conduct does not usually stop at a single incident, but can and does escalate into increasingly violent episodes. Thus, even if an initial act may be viewed as reckless, it more often than not acts as a precursor to significant acts of violence. In light of the difficulties in prosecuting domestic abusers and the repetitive nature of domestic abuse, the First Circuit's opinion limits the harm that can be inflicted by individuals who, through their own actions, expose their closest and most intimate family members to the threat of devastating injury and loss.

Not only the victims but also the law enforcement officers face grave danger from domestic abusers' access to firearms. Domestic abuse calls constitute the largest category of calls received by police departments each year. Approximately 14% of all police officer deaths occur during a response to domestic violence calls in a single year. Almost all of these officers are killed by a firearm.

The deaths of family members and law enforcement officers at the hands of domestic abusers impose great societal costs, ranging from direct costs, such as the costs of medical and mental health care,

to indirect costs including lost productivity and lost lifetime earnings.

Reversing the First Circuit's conclusion that the prohibition under Section 922(g)(9) extends to abusers who engage in reckless acts of domestic violence would undermine Congress' goal of combating domestic violence. Such a reversal would severely aggravate an already critical public safety crisis and increase the risk to the many victims of domestic abuse. For these reasons, the decision of the First Circuit should be affirmed.

ARGUMENT

I. Domestic Violence is a Widespread Crime Made More Lethal When Abusers Have Access to Firearms.

As this Court has recognized in *Castleman*, "[f]irearms and domestic strife are a potentially deadly combination[.]" *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) (citing *United States v. Hayes*, 555 U.S. 415, 427 (2009)). This understanding has been repeatedly echoed in the Court's jurisprudence. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 117 (2006) ("[W]e recognize that domestic abuse is a serious problem in the United States."); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 892 (1992) ("Thirty percent of female homicide victims are killed by their male partners."); *see also Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting) ("Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is

difficult to prove in court because the victim is generally reluctant or unable to testify.").

The statistics are sobering. According to the Department of Justice, an estimated 1.2 million to 1.5 million domestic violence crimes were committed each year between 2003 and 2012. Jennifer Truman et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization 2012*, NCJ 243389 at Table 1 (Oct. 2013).[2] These numbers, if anything, understate the problem as many domestic violence crimes are never reported. *See, e.g.*, Timothy C. Hart & Callie Rennison, Bureau of Justice Statistics Special Report, U.S. Dep't of Justice, *Reporting Crime to the Police 1992-2000*, NCJ 195710 at 5 (Mar. 2003).[3] Although the overall violent crime rate has decreased, the number of intimate partner victimizations has remained stable since 2000. Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2010*, NCJ 239203 at 1 (Nov. 2012).[4] Intimate partner violence has actually increased as a proportion of total violent crimes from 12.5% in 2000 to 17% in 2010. *Id.* at Appendix Table 1.

Access to firearms creates an additional layer of risk in this scenario. One study showed that firearms were used in about 32,900 incidents *each*

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[2] *Available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf (last visited Jan. 24, 2016).

[3] *Available at* http://www.bjs.gov/content/pub/pdf/rcp00.pdf (last visited Jan. 24, 2016) (54% of violent and seriously violent crimes committed by intimate partners reported to police).

[4] *Available at* http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (last visited Jan. 24, 2016).

year of nonfatal intimate partner violence victimizations from 2003 through 2012. *See* Jennifer L. Truman & Rachel E. Morgan, Bureau of Justice Statistics, U.S. Dep't of Justice, *Nonfatal Domestic Violence, 2003-2012*, NCJ 244697 at Table 7 (April 2014). Further, the majority of intimate partner homicides in the United States are committed with firearms. *See, e.g.*, April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 Inj. Prev. 90, 90 (2010) (over 60% of intimate partner homicides are committed with firearms). Having one or more guns in the home makes it five times more likely that an episode of domestic violence will result in death. *Id.* Furthermore, domestic violence assaults involving guns are twelve times more likely to result in death than those involving other weapons or bodily force. New Yorkers Against Gun Violence, *Firearms and Domestic Violence*, at 1 (Mar. 2013).[5]

Many such deaths are preventable. Researchers have concluded that abusers who kill "with a firearm would be unable or unwilling to exert the greater physical or psychological effort required to kill with another, typically available weapon." Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3045 (1992). An analysis of every identifiable mass shooting between 2009 and 2013 found that in 57% of those incidents, the shooter

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[5] *Available at* http://nyagv.org/wp-content/uploads/2013/03/Firearms-and-Domestic-Violence-NYAGV.pdf (last visited Jan. 24, 2016).

killed a current or former intimate partner or other family member. Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (September 2013), at 2, 4.[6] Over the past quarter century, more intimate partner homicides in the United States have been committed with guns than with all other weapons combined. Letter from Professor April M. Zeoli, School of Criminal Justice, Mich. State Univ., to Sens. Patrick J. Leahy & Charles Grassley, Chairman & Ranking Member of the U.S. Senate Comm. On the Judiciary (January 28, 2013).[7]

Domestic violence involving firearms is disproportionately skewed towards women. Women comprise the majority of victims of intimate partner violence, and homicide and the impact of firearms differs by gender. In 2013, 53% of female victims of intimate partner homicide were killed with firearms, while male victims came in at a distant 19%. *See* April M. Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, Epidemiological Rev. 1, 1 (2016) (citing data from the Federal Bureau of Investigation).[8] For male victims of intimate partner homicide, 40% were killed by firearms and 38% by knives. *Id.*

The need to address gun violence in domestic abuse situations is further borne out by the fact that

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[6] *Available at* http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf (last visited January 24, 2016).

[7] *Available at* http://www.judiciary.senate.gov/imo/media/doc/013013RecordSub-Leahy.pdf (last visited Jan. 24, 2016).

[8] *Available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/36124) (last visited Jan. 24, 2016).

women are almost four times more likely to be shot by a current or former intimate partner than by a stranger. Injury and Violence Prevention Program, Wash. St. Dep't of Health, *Firearm-Related Injury*, at 3 (Feb. 2013).[9] Although the number of homicides of women by strangers has decreased over time, the number of female homicides by intimate partners with firearms has increased. Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 232 (2006). In 2011, an average of 41 women were shot to death each month in the United States by current or former intimate partners. Violence Policy Center, *When Men Murder Women: An Analysis of 2011 Homicide Data* (Sept. 2013), at 6.[10] Alarmingly, women in the United States are eleven times more likely to be murdered with guns than women in other high-income countries. *See* Erin G. Richardson & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High-Income Countries, 2003*, 70 J. Trauma 238, 242 (2011).

Even in the absence of fatalities, guns are used by batterers to threaten, scare, coerce and intimidate their victims. One study found that 16 out of every 1,000 women in the United States have been threatened with a gun, and 7 in 1,000 women have had a gun used against them by an intimate partner. Sorenson, *supra*, at 235.

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[9] *Available at* http://www.doh.wa.gov/Portals/1/Documents/Pubs/970006Firearms.pdf (last visited Jan. 24, 2016).

[10] *Available at* http://www.vpc.org/studies/wmmw2013.pdf (last visited Jan. 24, 2016).

This form of domestic violence is associated with an increase in the risk of homicide. An abuser's previous threats with a weapon and previous threats to kill are associated with significantly higher risks for homicide. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1092 (2003).[11]

This Court has repeatedly recognized the inherent risks to public safety when domestic abusers have access to firearms. *See United States v. Hayes*, 555 U.S. 415, 427 (2009) ("Firearms and domestic strife are a potentially deadly combination nationwide."); *see also District of Columbia v. Heller*, 554 U.S. 570, 711 (2008) (Breyer, J., dissenting) ("If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence.").

Notwithstanding these grim statistics, laws and policies that prohibit batterers from obtaining access to firearms have reduced the rate of gun violence in domestic settings. According to an analysis of FBI data, 38% fewer women are shot to death by intimate partners in states that require a background check for every handgun sale. Mayors Against Illegal Guns, *Gun Laws and Violence Against Women* (citing U.S. Department of Justice, Federal Bureau of Investigation, Supplementary Homicide Reports,

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[11] *Available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.93.7.1089 (last visited Jan. 24, 2016).

2010).[12] Other studies indicate that prohibiting violent misdemeanants from possessing guns is associated with a decrease in the risk of arrest for new firearm crimes and violent crimes. Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns*, 285 JAMA 1019, 1026 (2002).

The social costs associated with injuries from firearms are significant. The total costs for all United States gunshot injuries sustained in 2010 alone has been $174 billion. *The Cost of Firearm Violence*, Children's Safety Network.[13] One 2003 study concluded that the costs of domestic violence exceed $5.8 billion annually, with a figure that includes nearly $4.1 billion in direct medical and mental health costs, and nearly $1.8 billion in indirect costs from lost productivity and lost lifetime earnings. Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States*, at 2 (2003).[14] These staggering figures do not take into account other costs such as criminal justice costs, wage losses, and the value of pain, suffering and lost quality of life.

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[12] *Available at* http://everytown.org/wp-content/uploads/2014/05/Gun_Laws_and_Violence_Against_Women.pdf (last visited Jan. 24, 2016).

[13] *Available at* http:// http://www.childrenssafetynetwork.org/sites/childrenssafetynetwork.org/files/TheCostofGunViolence.pdf (last visited Jan. 24, 2016).

[14] *Available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf (last visited Jan. 24, 2016).

II. Domestic Violence is Characterized by an Escalating Pattern of Abuse and a Prior Act of Violence is a Strong Predictor of Future Acts of Increased Aggression.

Domestic violence tends to follow an escalating pattern, which begins with threatening physical behavior and verbal abuse that eventually leads to increasing physical violence and, in some cases, death. One study estimated that the probability of future injury for a domestic violence victim who experienced no injury in a prior domestic violence incident (i.e., the probability of escalation of domestic abuse) was 83.7%. Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Rep. 409, 414 (2006). A landmark study across 11 cities by Johns Hopkins University showed that 70% of female homicide victims had been physically abused previously by the same intimate partner who ultimately killed them. *See* Campbell, *supra*, at 1091. In such a situation, where a prior act of violence, reckless or otherwise, is a predictor of future acts of greater violence in the same intimate setting, the prudent policy would be to deny the offender access to firearms. *See United States v. Lewitzke*, 176 F.3d 1022, 1027 (7th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3231 (U.S. Oct. 4, 1999) (No. 99-5677) ("[T]hose convicted of domestic violence offenses have already harmed their domestic partners in some fashion. It certainly would not be irrational for Congress to conclude that these

individuals pose the most acute danger of turning a gun on a family member.").

Domestic violence can take many forms and may start with violence that does not involve serious physical assault and injury. But studies show that abuse in a given domestic situation is not restricted to a particular form. Studies have also shown that violence is often preceded by emotionally controlling and verbally abusive behavior. *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence*, NCJ 181867, at 34-35 (Jul. 2000);[15] Kris Henning & Lisa M. Klesges, *Prevalence and Characteristics of Psychological Abuse Reported by Court-Involved Battered Women*, 18 J. Interpersonal Violence 857, 858 (Aug. 2003). Because even non-physical domestic abuse is a strong indicator of future physical abuse, including murder, there is a strong policy interest in keeping firearms out of the hands of all convicted domestic abusers, regardless of whether their initial use of violence was reckless or intentional.

III. Law Enforcement Officers Face Ongoing, Intractable Risks When Domestic Abusers Have Access to Firearms

Crimes of domestic violence create unique dangers for responding officers. *See Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 186 (2004) ("Officers called to investigate domestic disputes need to know whom

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[15] *Available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf (last visited Jan. 24, 2016).

they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."); *see also Randolph*, 547 U.S. at 127 (Breyer, J., concurring) ("[L]aw enforcement officers must be able to respond effectively when confronted with the possibility of abuse.").

There are various reasons why domestic violence calls prove so fatal for officers, all of which counsel in favor of restricting firearm access for domestic abusers. As the Chairman and CEO of the National Law Enforcement Officers Memorial Fund explained:

> No assignment poses more uncertainty to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.[16]

This combination of alcohol and drugs, emotional stress and weapons is often fatal to responding officers. According to a 2013 study of officer homicides that occurred responding to domestic violence calls, 27% of perpetrators were under the influence of drugs or alcohol at the time of the incident. Cassandra Kercher et al., *Homicides of*

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[16] Campus Safety, *Domestic Violence Takes a Heavy Toll on Law Enforcement Community*, Campus Safety Magazine (Oct. 8, 2007), *available at* http://www.campussafetymagazine.com/Channel/Mass-Notification/News/2007/10/09/Domestic-Violence-Takes-a-Heavy-Toll-on-Law-Enforcement-Community.aspx (last visited Jan. 24, 2016).

Law Enforcement Officers Responding to Domestic Disturbance Calls, 19 Inj. Prev. 331, 332 (2013). Drugs and alcohol may only heighten already-fraught situations, in which a domestic abuser may respond to a perceived loss of control by attacking his victim and/or responding officers. *See* Mark Wynn, *Officer Safety in Domestic Violence Responses*, The Police Chief 80 (Dec. 2013) 10-11. Finally, the presence of firearms in a residence multiplies the risk manyfold to responding officers, who may have no familiarity with the residence and are surprised by a weapon in the hands of a person already acting violently.

These risk assessments are borne out by data. According to a 2013 study, out of a total of 796 law enforcement officers killed between 1996 to 2010, 116 officers were killed while responding to domestic disturbance calls—nearly 15% of all law enforcement homicides during this time. Kercher, *supra*, at 332. Domestic disturbances were the third most common encounter resulting in law enforcement homicide. *Id.* Nearly half of the 116 officers killed were responding to intimate partner violence calls. *Id.* at 335. Moreover, the study concluded that domestic abusers posed a grave risk not only to law enforcement officers while responding to domestic violence calls, but also to their victims. *Id.* at 334. A larger portion of the victims of domestic violence were killed alongside responding officers (21%) compared to other domestic disturbance related calls. *Id.*

Almost all of these officers (94%) were killed by a firearm. *Id.* The study revealed that officers were more likely to be shot during a domestic disturbance call by a long barreled gun than in all other

encounters (46% versus 22%), which is consistent with the high proportion of perpetrators either ambushing the officer often before he or she can enter the residence (40%), barricading themselves in the home to prevent arrest (15%) or struggling with the officer to resist arrest (30%). *Id.* at 333. The study also demonstrated that body armor and backup assistance provide limited assistance in such situations. Although the use of body armor can increase the chance an officer would survive gunfire, body armor will not prevent a fatal shot to another part of the body, as shown by the finding that approximately 67% of the officers studied were wearing body armor when killed, that 52% were killed through gunshot wounds to the head/neck, where body armor provided little to no protection, and that 34% died on the scene. *Id.* at 332. Similarly, the study revealed that when an officer worked with a partner or had backup present, the likelihood of more than one officer being injured or killed was actually significantly greater for domestic disturbances than for other encounters. *Id.* at 334.

Mark Wynn, a faculty member with ICAP's National Law Enforcement Leadership Initiative on Violence Against Women, acknowledged this trend in his article for Police Chief Magazine, writing:

> With increasing frequency, it's not just a single officer but multiple officers who are killed. In Birmingham Alabama, three were killed; Pittsburgh Pennsylvania, three more; in Pleasanton and Odessa Texas, six total fellow officers were gunned

> down. All these officers were responding to domestic violence calls. Most often the weapon of choice is the high-power, high-capacity rifle which can defeat normal patrol armor.

Wynn, *supra*.

The numbers bear out the reality of police fatalities and at least 21 officers have been shot and killed while investigating domestic violence according to statistics compiled by the National Law Enforcement Officer's Memorial Fund. The frequency of domestic violence calls is not going to change. As this Court has acknowledged, "[f]amily disturbance calls . . . constitute the largest single category of calls received by police departments each year." *Randolph*, 547 U.S. at 126 (Breyer, J., concurring) (quoting Helen J. Mederer & Richard J. Gelles, *Compassion or Control: Intervention in Cases of Wife Abuse*, 4 J. Interpersonal Violence 25 (1989)). In the United States, between 473,000 and 628,000 incidents of intimate partner violence and between 166,000 and 294,000 incidents of violence involving other family members were reported to the police annually. Kercher, *supra*, at 331.

These circumstances require police departments and other law enforcement and first responder agencies to devote significant taxpayer resources to combat the problem. Nationally, 15% to 40% of all calls for police assistance are related to domestic violence incidents. Michael G. Breci, *Police Response to Domestic Violence, in Crisis Intervention in Criminal Justice/Social Service* 102, 102 (4th ed.

2006). Other costs include "hazardous duty pay, early retirement programs, use of bulletproof vests, and specialized training in backup assistance and weapon retention." J. David Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, 11 Justice Quarterly 99, 115 (1994).

Petitioners' narrow reading of the term "use" heightens the risks that police officers face every day by permitting convicted domestic violence offenders to have access to firearms, in contradiction of Congress' "manifest purpose" of closing a dangerous loophole in the federal firearms legislation. *See Hayes*, 555 U.S. at 426-27. Accordingly, the First Circuit's decision should be affirmed.

IV Prosecuting Domestic Violence is Challenging and Perpetrators May Avoid Conviction

Petitioners' assert that the availability of mandatory arrest requirements and no-drop rules have swept individuals whose "conduct is minor or unclear" into the criminal justice system and unfairly dubbed them as domestic violence offenders. *See* Pet. Br. 27. Petitioners' thus urge a narrow reading of the statute to avoid disenfranchising vulnerable groups who may have pled guilty be misdemeanors because of lack of access to adequate legal advice. *Id.* at 29-30.

This is not an accurate representation of the reality. Prosecuting domestic abuse is challenging. *See, e.g., United States v. Tooley*, 717 F. Supp. 2d 580, 594 (S.D. W. Va. 2010) (noting that the Lautenberg Amendment, which added Section 922(g)

"was based on the recognition that, because of the difficulty in proving felony domestic violence charges, [this] particular crime was often under-charged or under-pled, and domestic violence consistent with the elements of a felony frequently resulted only in a misdemeanor plea or conviction").[17] Victims often refuse to cooperate and perpetrators may be further inflamed by police or state intervention, and escalate their violent conduct. *Stimmel v. Lynch*, 2015 U.S. Dist. LEXIS 130132, at *9 (N.D. Ohio Sept. 28, 2015) (internal citations omitted) ("Prosecutors face two major obstacles to obtaining felony convictions: some family members are willing to forgive the aggressors in order to restore harmonious relations, while others are so terrified that they doubt the ability of police to protect their safety."). In some cases, mandatory arrest and "no drop" rules puts law enforcement in a no-win situation. These rules were put in place for protection of the victim, but the victim may not be willing to cooperate to allow these mechanisms to act. Even if arrest and prosecution follows, there is a risk that the perpetrator may be further to inflamed by law enforcement activities and take the anger out on victim, and law enforcement officers seeking to protect the victim.

The following news story, *Tangled Emotions Make Domestic Violence Cases Hard to Stop, Prosecute* by Tyler Jett,[18] illustrates how the cycle of arrest,

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[17] *Tooley* also highlighted the problem with, "[o]udated or ineffective laws often treat domestic violence as a lesser offense." 717 F. Supp. 2d at 594-95.

[18] Tyler Jett, *Tangled Emotions Make Domestic Violence Cases Hard to Stop, Prosecute*, Chattanooga Times Free Press (Oct. 19,

denial, and violence repeats with perpetrator being arrested, released because of lack of cooperation and escalating conduct until there is a fatality:

> Between the morning that the judge let him walk away and the night the police shot him, Christopher Andrew Shell changed.
>
> Sabrina Bloodworth, his girlfriend of 10 years, said Shell talked about his own death after his first domestic violence charges were dropped, about an ending he expected to arrive soon. He showed Bloodworth his tools, told her the price of each hammer and drill. He seemed sick, but she can't explain why.
>
> "When I die," she remembers him saying, "sell these. Support yourself."
>
> Then, on Sept. 27, Bloodworth ran across Cochran Drive to her cousin's house, away from Shell. Walker County Sheriff Steve Wilson says Bloodworth reported her boyfriend beat her so severely that at one point she lost consciousness. Bruises and cuts flecked her face.
>
> A deputy and a sergeant arrived at the house. Shell stayed inside. A deputy

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2015), http://www.timesfreepress.com/news/local/story/2015/oct/19/tangled-emotions-make-domestic-violence-cases/331236/ (last visited Jan. 24, 2016).

saw him through the window, Winslow said, holding a .59 caliber muzzleloader. Eight more officers came for backup. Some called out for Shell, but he remained inside for almost an hour.

Finally Shell walked onto the front porch, holding his rifle. Wilson said Shell lifted the gun in a "threatening manner," and officers fired, killing him. The Georgia Bureau of Investigation is reviewing the case.

A week after the shooting, Bloodworth stood on the same front porch. She pointed out bullet holes on the walkway to the house, on the front step to the porch, on the right side of the house, in a living room wall and in the bathtub. The splintered front door has been replaced.

Bloodworth, 47, said she doesn't remember what happened before the shooting that night because she suffered a concussion. She doesn't believe Shell attacked her, though. He was bigger than her. If he tried to hurt her, she figures, he would have killed her.

"He didn't hit me," she said.

"He didn't hit me," she said again.

"There's nothing."

This is the second time this year Bloodworth recanted on a domestic violence accusation against Shell. Experts say her reversals are common among victims and show the challenges of investigating and prosecuting cases like these. Often, the victim is the only witness. If that witness won't testify, convicting a batterer is difficult.

Victims recant for many reasons. They [are] (*sic*) love their abusers. They don't want to cause the person who hurt them to go to jail. They fear violent retribution for testifying, or believe the batterer's punishment won't be serious enough to protect them. Or they blame themselves, thinking they provoke the attacks.

Instead of a criminal conviction, ending with jail time and an attempt at rehabilitation, the relationship continues, often escalating to more severe violence or even death for the victim or attacker.

. . . .

The first incident between Bloodworth and Shell occurred March 28. A Walker County sheriff's investigator wrote in an incident report that he was called to Hutcheson Medical Center and found Bloodworth in the

emergency room, her right eye bloody and swollen shut. Doctors were stitching a cut that ran from Bloodworth's cheek, through her eyebrow, to the top of her nose.

She told the investigator Shell had been drinking and got angry when they argued about a video game. He smashed a beer can against her face.

. . .

Six months later, on Sept. 21, Bloodworth and Shell appeared in Walker County State Court. Bloodworth said she told Judge Billy Mullinax she wanted the case dropped. She said the version of events in the incident report is not accurate.

On that night, she said, Shell was on the front porch, arguing with a man on their lawn. Bloodworth said she was in the family room, about 10 feet behind Shell. She said her boyfriend tried to throw his beer can at the man on the lawn. Somehow, Shell flung the can behind him and it hit Bloodworth. She said Shell was sick about accidentally hurting her. Mullinax agreed to drop the case.

. . . .

> Bloodworth said she loved him from the time she met him, 10 years ago, when he built a porch for her grandmother. He was 6 feet, 4 inches tall, blonde, broad and tan. He was handy around the house but also shopped with her at estate sales and flea markets. They watched action movies at night and traveled to Daytona, Fla., every summer to walk on compact sand and watch NASCAR races.
>
> On Mother's Day, he planted two rosebushes for her.
>
> "He took care of me," she said. "He provided for me. He protected me. He stood up for me. I never met a man like him."
>
> On the night of the shooting, she said she sat on the side of the road at the end of the bloc. She couldn't see, didn't know what was happening.
>
> Then, she heard a series of gunshots, she remembers that sound, if nothing else.

Ms. Bloodworth's story above is hardly unusual, and illustrates the well-established pattern of abuse, reconciliation, and further abuse. Domestic abuse is unique in the ongoing emotional and physical connection between the victim and the abuser which may have extended over prolonged

periods of time. The ongoing relationship almost inevitably includes periods of harmony and affection, the memories of which can override the shock from the brief episodes of violence. *See* Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 Fordham Urb. L.J. 953, 953-56 (1999). The "intense psychological dynamics" often lead to a "cycle of violence" where periods of violence are followed by the so called "honeymoon phase" when the batterer calms down and engages in loving contrition to keep the partner he loves. *Id.* at 953-55. It is generally during this period of relief and re-establishment of domestic connections that prosecutions take place. *Id.* at 955. Reunited with their loved ones, victims are reluctant to dwell on the negative and refuse to testify against their abuser. *Id.* The honeymoon period ends with another episode of violence, followed again by reconciliation and harmony, interrupted by yet more violence. *Id.* This cycle, commonly referred to as "battered women syndrome," is unique to domestic abuse and accounts for the high rates of recidivism But inside this pattern, law enforcement often has to admit defeat because without the cooperation of the victim, there is frequently no case. In short, contrary to Petitioners' claims that small, questionable domestic incidents may be inflated to unfairly sweep individuals into the criminal justice system, the reality is that domestic violence is difficult to prosecute, and small incidents are but precursors to ones of greater violence.

Complicating the picture is the reality that the victim may not be able to leave the abusive domestic

relationship. Studies have shown that women who are more fearful of their partner are paradoxically less likely to leave an abusive relationship. *See, e.g.*, Jinseok Kim & Karen A. Gray, *Leave or Stay? Battered Women's Decision After Intimate Partner Violence*, 23 J. Interpersonal Violence 1465, 1465-85 (2008) (reviewing the literature on the subject and presenting the results of a new study). Victims are also deterred from leaving because of financial fears, lack of a support network, social and religious disapproval, and fear for the wellbeing of their children. *See, e.g.*, Ola W. Barnett, *Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors—Social Support and Internal Inhibiting Factors*, 2 Trauma Violence & Abuse, 3, 3-8 (2001).

Nor has the crisis been substantially mitigated by mandatory arrest policies and no drop policies. Studies have shown that female victims are often concerned that involving the police carries its own risk. *See, e.g.*, Meghan A. Novisky & Robert Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 Violence Against Women 65, 66-69 (2015) (noting, for example, that "victims feared that they would be wrongfully identified as abusers"). Victims may not want to involve law enforcement in mandatory arrest situations as they are fearful about losing custody of children, losing housing benefits, and being further victimized by the perpetrator long after the criminal justice system has run its course. *Id.*

In sum, domestic violence is a chronic problem that defies easy definition or resolution because of the complicated family and social dynamic. The First

Circuit correctly recognized the unique nature of domestic violence, and reversing its decision will increase the dangers faced by victims and law enforcement officers reacting to abusive situations.

V. The First Circuit's Interpretation is Consistent with Congressional Intent by Including Reckless Acts within the Ambit of "Misdemeanor Crime of Domestic Violence"

The First Circuit's opinion properly includes reckless acts within the scope of Section 922(g)(9) offenses in the context of domestic violence. The First Circuit recognized "context matters," and as "Section 921 (a)(33)(A) is a provision crafted in the unique context of domestic violence and it should be so interpreted." *United States v. Voisine*, 778 F.3d 176, 180 (1st Cir. 2015). Reversing the First Circuit would "frustrate Congress's manifest purpose" of prohibiting domestic abusers from possessing firearms. *See Hayes*, 555 U.S. at 427. Congress recognized, prior to the enactment of Section 922(g)(9), that existing federal laws "were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Id.* at 426. Moreover, this Court has recognized that Section 922(g)(9) was enacted to close a "dangerous loophole" in federal felon-in-possession laws. *Id.*; *Johnson v. United States*, 559 U.S. 133, 152-53 (2010) (Alito, J., dissenting) ("Congress therefore enacted this provision to keep firearms out of the hands of such abusers.").

Legislative history supports this reading of the statutory language. 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) ("In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms."). The First Circuit's decision correctly captures Congressional intent and the repetitive nature of domestic violence. Petitioners do not dispute that domestic abuse involves an "ongoing cycle of behavior between intimate partners or family members that may escalate." Pet. Br. 25. Nor do Petitioners suggest that those convicted only of "reckless" acts of domestic violence will break the typical pattern of repeated escalating acts of violence. In short, those convicted of "reckless" domestic violence fall well within the ambit of Section 922(g)(9) because the legislature recognized that domestic violence is not restricted to a one-off incident by those who have "demonstrated that he or she poses an unacceptable risk" by attempting of threatening violence against a loved one. *See* 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)

This Court has recognized that statutory definitions must be construed in light of the context to which they apply. *Johnson*, 559 U.S. at 139-140 (internal citations omitted) ("Ultimately context determines meaning and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense "). The Lautenberg Amendment specifically was designed to address the unique nature of domestic violence, which made it

distinct from other acts of violence. Cf. 142 Cong. Rec. S10377-78 (internal citations omitted) ("[V]iolent acts classified as 'misdemeanors' in a domestic context would often 'be considered felonies, if committed by strangers.'"). Refusing to consider the context and nature of violence defeats the congressional intent, and the First Circuit correctly relied on the unique context of domestic violence in reaching its decision.

Nor is the First Circuit's interpretation inconsistent with the common law definition of battery which traditionally encompassed reckless infliction of harm. *See* 2 Wayne R. LaFave, *Substantial Criminal Law* § 16.2(c)(2) (2d ed. 2003); *see also Commonwealth v. Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (holding that reckless shooting qualifies as a battery because if the victim "had died from the pistol shot, the defendant . . . would have been guilty of manslaughter. As she survived the injury, the same principle now requires a conviction of assault and battery"), *see also* Model Penal Code § 211.1 cmt. n.62 (the "necessary intent to injure could be inferred from recklessness."). Here, the Congress has applied the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence." *Castleman*, 134 S.Ct. at 1411 (internal citations omitted) ("[I]t makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction."). Thus, the logical conclusion is that Congress intended to include reckless battery within the ambit of the "use of force" requirement in a "misdemeanor crime of domestic violence."

VI. Practical Considerations Require Affirmation of the First Circuit's Opinion.

Reversing the decision below would potentially exempt a substantial number of domestic abusers from the restrictions of Section 922(g)(9). Thirty-four states and District of Columbia define misdemeanor assault to include reckless causation of bodily injury. Resp't Br. 38. At the time Section 922(g)(9) was enacted, at least eight States had domestic violent assault provisions which included reckless conduct either expressly or by incorporating the State's general assault and battery provisions. *Id.* at 39. Since then, nine more States have added domestic assault and battery provisions that include recklessness. *Id.* Federal assault statutes also do not specify a required *mens rea*. *Id.* at 40. Adopting the Petitioners' interpretation would exclude categorical coverage of the majority of state misdemeanor battery statutes, state statutes specifically targeting domestic violence, as well as federal assault statutes from the ambit of Section 922(g)(9). *Id.* Such an interpretation would negate Congressional intent of keeping weapons out of the hands of domestic abusers. If the legislature had intended for a higher *mens rea* to apply, it could easily have adopted the required provisions. *See Voisine,* 778 F.3d at 181 (internal citations omitted) (noting that "'Congress expressly rejected' the § 16(a) definition, instead developing the term 'misdemeanor crime of violence' that was 'probably broader' than the definition" in §16"). The Congress did not intend to limit the provisions to a higher *mens rea*. Petitioners should

not be allowed to graft a higher standard than what the Congress intended.

Finally, upholding the First Circuit's decision would be consistent with *Castleman*. In *Castleman*, this Court recognized that "'[d]omestic violence' is not merely a type of 'violence,'" but rather a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Castleman*, 134 S.Ct. at 1411 & n.4 This was precisely the rationale applied by First Circuit in reaching its conclusion that a *mens rea* of recklessness in domestic violence fell within the scope of Section 222(g)(9). *Voisine*, 778 F.3d at 781.

CONCLUSION

This Court should affirm the judgment below.

JANUARY 25, 2016

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IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL DOMESTIC VIOLENCE HOTLINE, THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, THE BATTERED WOMEN'S JUSTICE PROJECT, AND END DOMESTIC ABUSE WISCONSIN *ET AL.* (Additional *Amici* Continued on First Page) IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici include nonprofit organizations devoted to remedying domestic violence through legislative, legal, and other initiatives, as well as additional organizations dedicated to serving and supporting survivors of domestic violence. Among other things, they provide shelter, counseling, and advocacy services, as well as serving as leaders in developing and implementing the Violence Against Women Act and other laws that provide safety and independence for survivors of domestic violence. *Amici* have hundreds of years of collective experience working with such survivors, including extensive efforts to improve both the criminal and civil justice systems' responses to and prevention of domestic violence.

Over the past decade, *amici* have collected extensive anecdotal and other data, first-hand, from domestic violence survivors. These data show that domestic violence abusers frequently engage in a pattern of abusive conduct that includes the use of firearms to control and terrorize their victims. As a result of this information, *amici* have advocated for decades for safety protections for survivors,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *amici* state that counsel of record for both Petitioners and Respondent have consented to the filing of this brief—Petitioners through a blanket consent filed with the Clerk of this Court and Respondent through a letter sent to *amici's* counsel. *Amici* are described in the Appendix to this brief.

including the federal prohibition of misdemeanant firearm possession at issue in this case. This prohibition was intended to protect victims of domestic violence from further harm by prohibiting access to firearms by abusive individuals. In furtherance of this goal, ensuring that misdemeanor domestic violence crimes with the *mens rea* of "reckless" are included within the firearm prohibition of 18 U.S.C. § 922(g)(9) is crucial to preventing many forms of domestic violence and limiting the severity of abuse that does occur. For these reasons, *amici* submit this brief in support of Respondent to summarize their experience with the realities of everyday domestic violence.

SUMMARY OF ARGUMENT

In *United States v. Hayes*, 555 U.S. 415 (2009) and *United States v. Castleman*, 134 S. Ct. 1405 (2014), this Court was called upon to interpret the Lautenberg Amendment to the federal Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*[2] The Lautenberg Amendment prohibits individuals who have been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). This Amendment sought to close a "'dangerous loophole'" in the gun-control laws that allowed many domestic abusers who had not been charged or convicted of felonies to possess firearms. *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. 22985, 22986). This Court has now twice construed

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[2] *Amici* submitted briefs in both *Hayes* and *Castleman* addressing the impact of firearms in domestic violence cases. *Amici's* briefs were cited by the Court in both decisions.

the Lautenberg Amendment to effectuate this remedial purpose. *Amici* respectfully urge this Court to do so a third time here and affirm the First Circuit's decision.

The First Circuit's opinion is grounded in principles articulated in *Castleman*—namely, that "domestic violence" is a "term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." 134 S. Ct. 1411. The application of this principle here was proper—indeed, necessary. This Court, the federal government, many states, and other nations all have recognized that "domestic violence" involves a pattern of conduct intended to coerce and control the victim. An abuser's pattern of conduct encompasses a broad range of behaviors—some violent, some harassing, some coercive—all of which the abuser intentionally combines to create a complete system of abuse and control. It is therefore incorrect to classify an individual who "recklessly" abuses a domestic partner as acting unintentionally or somehow being less culpable of "domestic violence." Simply put, "[m]en do not beat their wives by accident." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1136 (9th Cir. 2006) (Wardlaw, J., dissenting).[3]

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[3] While women may perpetrate domestic violence against current or former partners, and intimate-partner violence also occurs in same-sex relationships, the vast majority of victims of domestic violence are women and their attackers, men. *See, e.g.*, Shannan Catalano, Bureau of Justice Stats., U.S. Dep't of Justice, *Special Report: Intimate Partner Violence, 1993-2010*, NCJ 239203 at 1 (Nov. 2012) (approximately four in five victims of domestic violence are female). Accordingly, this brief

(continued...)

Domestic violence is a crime that is the sum of many large and small acts of abuse and coercion.

The presence of a firearm in the home of a domestic abuser is problematic on multiple fronts. First, domestic violence "often escalates in severity over time and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408 (citation omitted). In fact, firearm ownership is a, if not the, key predictor of femicide between non-strangers. *See* Michael B. Siegel & Emily F. Rothman, *Firearm Ownership and the Murder of Women in the United States: Evidence That the State-Level Firearm Ownership Rate Is Associated with the Nonstranger Femicide Rate*, 3 Violence & Gender (forthcoming Mar. 2016). Critically, evidence shows that where a firearm is present, a woman is *six times* more likely to be killed. Jacquelyn C. Campbell et al., *Assessing Risk Factors For Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003). Second, even if a firearm present in the home of a domestic abuser is never fired, the very presence of the weapon is a tool used to terrorize the victim and perpetuate the abuser's power and control. In other words, the firearm remains a potent instrument of domestic violence and control. Several *amici*—principally, the National Domestic Violence Hotline ("the Hotline")—have received thousands of first-hand accounts of such abuse. The emotional and psychological toll of such abuse is devastating,

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(continued...)
describes domestic violence in terms of female victims and male abusers/attackers.

and underscores the need to keep firearms out of the hands of individuals who have a demonstrated proclivity for domestic abuse—whether "reckless" or otherwise.

Finally, the Lautenberg Amendment was intended to "establish a policy of *zero tolerance* when it comes to guns and domestic violence." 142 Cong. Rec. S10377-01 (1996) (emphasis added). In contrast to this clear directive, Petitioners advocate a "sometimes tolerance" policy. Such a policy would be untenable. Based on nothing more than a formalistic *mens rea* distinction found nowhere in the statute, Petitioners' approach would turn § 922(g)(9) on its head, and would reopen, at least partially, the "dangerous loophole" that the statute was intended to close. As the court below observed, "If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9)." *United States v. Voisine*, 778 F.3d 176, 183 (1st Cir. 2015). It did not, and for good reason: individuals convicted of "reckless" crimes of domestic violence pose the same risk of future abuse as individuals convicted of "intentional" crimes of domestic violence.

The decision of the First Circuit should be affirmed.

ARGUMENT

I. A Single Criminal Act of Domestic Violence—Even a "Reckless" Act—Nearly Always Falls into a Broader Campaign of Intentional Conduct Meant to Coerce and Control the Victim.

18 U.S.C. § 922(g)(9) proscribes individuals who have been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. *Amici* are principally concerned here with the Court's understanding of the complex behaviors that constitute "domestic violence."

A. Domestic violence is best characterized as a pattern of conduct intended to subordinate one partner to the power and control of the other.

It is largely uncontroversial that domestic violence embodies far more than the mere use of physical force. Rather, its animating force is power—physical, emotional, sexual or psychological—over the partner. The Office on Violence Against Women of the U.S. Department of Justice defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimidate partner. Domestic violence can be physical, sexual, emotional, econornic, or psychological actions or threats of actions that influence another person." *Domestic Violence*, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last

visited January 25, 2016). Several state agencies and courts, too, have endorsed this view of domestic violence.[4] Even Petitioners themselves concede this essential truth: their brief states, "To be sure, domestic violence is a serious problem, and it often involves an ongoing cycle of behavior between intimate partners or family members that may escalate. Legislative and law enforcement responses have recognized and should recognize it as such." Pet. Br. 25. At bottom, domestic violence "entails a

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[4] *Understanding Domestic Abusers*, New York State Office for the Prevention of Domestic Violence, www.opdv.ny.gov/professionals/abusers/coercivecontrol.html (last visited January 25, 2016) ("Domestic abuse is ongoing, purposeful behavior that is aimed at dominating one's partner, and often one's children as well."); *Domestic Violence*, Tenn. District Attorney's Gen. Conf., http://www.tndagc.org/dv.htm (last visited Jan. 25, 2016) ("Domestic violence is about power and control. It is not just about hitting or punching."); *Domestic Violence / Intimate Partner Violence*, California Department of Public Health, www.cdph.ca.gov/HealthInfo/injiosaf/Pages/DomesticViolence/aspx (last visited Jan. 25 2016) ("California's Domestic Violence Advisory Council defines domestic violence as a spectrum and often a pattern of behaviors that includes physical, sexual, verbal, emotional, and psychological abuse and/or economic control used by adults or adolescents against their current or former intimate partners in an attempt to exercise power and authority. "); *Domestic Violence Awareness Guide*, Oklahoma Department of Human Services 8 (2008) ("Domestic violence is a pattern of behavior used to establish power and control over another person through fear and intimidation. "); *People v. Disher*, 224 P.3d 254, 258 (Colo. 2010) ("That is the hallmark of domestic violence: an action that is used to coerce, control, punish, intimidate, or exact revenge within the context of an intimate relationship."); *Bates v. State*, 258 P.3d 851, 862 (Alaska Ct. App. 2011) (same).

malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control)." Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 15 (2007).[5]

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[5] *Accord* Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 Vill. L. Rev. 145, (2015) (defining intimate partner violence as, "a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics" (quoting Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 244-45 (2000)); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007) ("[D]omestic violence is about gaining control of another person."); Camille Carey, *Domestic Violence Tort: Righting a Civil Wrong*, 62 U. Kan. L. Rev. 695, 700 (2014) ("Assault is extremely common in abusive relationships. Abusers seek to control their partners through threats of violence and intimidation."); Bonita Meyersfeld, *Domestic Violence and International Law* 120 (2010) ("Systemic intimate violence too may manifest in a continuum of harm; it is a hybrid of physical, emotional and sexual harm, the effects of which are often invisible."); Lynne Harne & Jill Radford, *Tackling Domestic Violence: Theories, Policies and Practice* 6 (2008) ("[A]lthough domestic violence takes many forms, it is the physical and sexual violence or threats of these forms of violence, that serve to keep the other forms in place, because despite its pernicious nature, psychological violence and emotional cruelty take their power from the threats and realities of physical and sexual violence which contextualize it.").

A proper definition and understanding of "domestic violence" is essential here because in interpreting a statute "[u]ltimately, context determines meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010). And in this context, as it is properly understood, a single "reckless" act must not be viewed in isolation. But rather, each act is part of ongoing—*purposeful*—behavior to instill fear and gain control over a domestic partner: "Domestic abuse is not just a curse, a slap, or even a severe beating. It is an *intentional, ongoing, purposeful* effort." Elaine Weiss, *Family and Friends' Guide to Domestic Violence: How to Listen, Talk and Take Action When Someone You Care About is Being Abused* 14 (2003) (emphasis added). Stated differently, "[t]he batterer's desire to dominate his victim functions as the animating force behind his abusive behaviors." Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 965 (2004).

A contrary view of domestic violence—that is, one "through the prism of the incident-specific and injury-based definition of violence"—would "conceal[] its major components, dynamics, and effects, including the fact that it is neither 'domestic' nor primarily about 'violence.'" *Coercive Control*, *supra*, at 10; *see also* Tuerkheimer, *supra*, at 961 ("Premised on a transactional model of crime that isolates and decontextualizes violence, [such a] law applied to domestic abuse [would] conceal[] the reality of an ongoing pattern of conduct occurring within a relationship."). Consequently, domestic violence is not properly viewed in isolated, incident-specific occurrences. Such a snapshot approach

ignores the plain realities of domestic violence and accordingly must be rejected.

Indeed, other nations have taken steps to criminalize "coercive control" as a crime of domestic violence. For instance, section 76 of the Serious Crime Act of 2015, proscribes "[c]ontrolling or coercive behavior in an intimate or family relationship" in England and Wales. Serious Crime Act 2015, c. 9, § 76 (Eng.). As stated by the U.K. Home Secretary Theresa May, "Coercive control can be tantamount to torture. In many cases, dominance over the victim develops and escalates over the years until the perpetrator has complete control." *Government to Create New Domestic Abuse Offence*, Home Office (U.K.), https://www.gov.uk/government/news/government-to-create-new-domestic-abuse-offence (last visited Jan. 25, 2016). Similarly, the Canadian Department of Justice has opined that even "[a] single act of violence or emotional intimidation should be classified as a pattern of domestic violence if it causes lingering fear and/or is associated with a pattern of coercive control in the relationship." *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems, Part 5: Differing Understandings on the Nature of Domestic Violence*, Government of Canada Department of Justice, www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/p3.html (last visited Jan. 25, 2016). Domestically, there are increasing calls from experts to recognize that any criminal act of domestic violence addressed in the justice system must be viewed within the context of the whole pattern of violent, abusive, and coercive acts perpetrated by the abuser. *E.g.*, Tuerkheimer, *supra*, at 961 ("In this

Article I explore the rupture between women's experiences of battering and the remediation offered by the criminal law.").

B. The First Circuit faithfully applied this Court's instruction that "domestic violence" is a unique phenomenon that extends beyond traditional "generic" violence.

A majority of this Court has already endorsed the above-described view of domestic violence. Last term, this Court recognized that "domestic violence," as used in the Lautenberg Amendment, is different from "violence" in the nondomestic context. "'Domestic violence,'" the Court wrote, "is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Castleman*, 134 S. Ct. at 1411. The Court explained that while "[m]inor uses of force may not constitute 'violence' in the generic sense," such acts are "easy to describe as 'domestic violence,' when the accumulation of such acts over time can subject one intimate partner to the other's control." *Id.* at 1412. The Court further noted that this definition of "domestic violence" is the one "used by the organizations"—such as *amici*—"most directly engaged with the problem and thus most aware of its dimensions." *Id.*

The First Circuit's decision below is animated by the principles that this Court articulated in *Castleman*—that is, "domestic violence" should be differentiated from what is ordinarily understood as violence. The First Circuit noted early in its analysis that "Section 921(a)(33)(A) [the provision defining "misdemeanor crime of domestic violence"]

is a provision crafted in the unique context of domestic violence, and it should be so interpreted." *Voisine*, 778 F.3d at 180 (citing *Castleman*, 134 S. Ct. at 1410-12 & n.4). The decision similarly cited this Court's reasoning in *Castleman* that "domestic violence" is a term of art whose definition embraces a wider spectrum of conduct than violence in the nondomestic context. *Id.* at 181. For these reasons, the court concluded that "§ 922(g)(9)'s unique context, as described in *Castleman* and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly" than other statutory provisions involving crimes of violence. *Id.* at 182.

II. In Domestic Violence Situations, Firearms are Instruments that, Even if Not Fired, Further an Abuser's Coercive Control Over the Victim.

It is an unfortunate reality that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S. at 427 But a firearm need not actually be fired to cause trauma, and this fact was expressly stated by Senator Lautenberg: "In 150,000 cases of abuse, spousal abuse, a gun is present. That means that perhaps it is put to a woman's head or put to her face in front of a child, or children, and even though the trigger is not pulled, the trauma is enormous." 142 Cong. Rec. S10377-01 (1996). Senator Lautenberg was correct. In *amici's* experience with victims of domestic violence, firearms are routinely used by abusers to terrorize and ultimately control the victim.

A. As with all victim support organizations, *Amici* are on the front lines of domestic abuse.

Amici are part of a network of organizations that provide not only support and assistance to victims of domestic abuse but also information and insight on this pervasive crime to government officials, law enforcement agencies, media, and the general public.

Some *amici*—including the Hotline, the Battered Women's Justice Project, and others—provide confidential, one-on-one support to individuals who contact it either by phone ("callers") or live chat over the Internet ("chatters"). Overall, the Hotline has assisted more than 3.85 million people since it took its first call in February 1996.[6] In 2015, the Hotline received approximately 436,329 contacts, including more than 334,917 calls, 85,144 chats, and 16,268 texts. Additionally, the Hotline's website for adult survivors received 1,941,798 web sessions, while the Hotline's teen and youth website received 2,514,623 web sessions.

Almost three out of every four contacts (72%) at the Hotline are victims of domestic abuse.[7] Ninety

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[6] All data referenced in this section are on file with the Hotline.

[7] The remaining 28 percent consists mostly of supportive family, friends, neighbors, and work colleagues asking how to help the survivors. A small percentage of callers are abusers looking for help, and a very small percentage of callers are the general public looking for information, wrong numbers, or prank calls.

six percent of these victims experienced emotional or verbal abuse, including threats. Sixty nine percent experienced physical abuse, such as hitting. And eight percent experienced sexual abuse, including rape.

B. *Amici's* data demonstrate that abusers employ firearms to control and terrorize their victims.

In the spring of 2014, the Hotline conducted an eight-week survey with individuals who utilized the Hotline's phone or chat services, regarding the use of firearms in domestic violence situations.[8] More than 4,700 contacts voluntarily participated in the survey. Hotline advocates asked participants a series of questions, including whether their partners had access to firearms, had threatened to use such firearms, and had in fact used such firearms. Nearly 16 percent of the respondents' partners had access to guns. Of those, 22 percent said their partners, or former partners, had threatened to use a firearm to hurt the victim, their children, other family members, friends, household pets, or to commit suicide. Ten percent said their partner had fired a gun during an argument. Over half said they would feel safer if law enforcement confiscated their partner's firearms. Overall, two-thirds of respondents believed their partners were capable of killing them.

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[8] All survey data and anecdotal responses received are on file with the Hotline. Pursuant to the terms of the survey, and to preserve the safety and confidentiality of the participants, all identifying data are redacted to preserve the survivors' confidentiality.

At the end of the survey, Hotline advocates asked participants an open-ended question: "Is there anything else you would like to tell me about your partner or ex-partner's possession and use of firearms, including examples of how he or she uses firearms to threaten you or others?" Hotline advocates wrote summaries of callers' answers and recorded chatters' responses. The survey revealed that, in an abusive relationship, abusers invoke the mere presence of a firearm to control and terrorize their victims. Callers described a wide variety of single incidents of gun use that haunted them during the course of an abusive relationship, just as Senator Lautenberg had stated. Some examples from callers, which range from subtle intimidation to overt acts and bald threats, include:

- Abuser keeps his firearm in the closet, and goes to the closet while screaming at the victim. The abuser never actually pulls out the firearm, but goes to the area where it is stored.
- The abuser used a firearm to kill the family cat. The abuser frequently held the firearm to the victim's head and said that he would kill her. The abuser often threatened to kill the family and then himself. The two are separated now, but the abuser told the victim that if she ever left, he would wait a few years to kill her so that no one would guess it was him.
- The abuser has a concealed-weapons permit and has put his gun on himself multiple times, and has threatened, "If you ever leave me, I'll kill you."

- The abuser threatened their 5-year-old child that he would shoot the entire family and maybe others.
- The abuser was a military police officer. He told the victim that he was bringing home his guns as a way to threaten her.
- The victim was at a park when the abuser drove by. The abuser told the victim to come to his car, and when she did not, he fired shots into the air to scare her.
- The victim told the police that the abuser had unregistered firearms when she called the police after an assault. The police did not offer to take the weapons. The victim did not feel that the police believed her.[9]

Chatters also detailed a similar assortment of incidents of their abusers tormenting the with firearm use on an ongoing basis, including:

- "He shot a gun at my feet and someone called the police. [He] was arrested on violation of restraining order but gun charges were dropped."
- "[He] never fired the pistol, but he would sit on my chest and point it at my head. He would put it right next to my temple."
- "He's never pointed it at me but he has laid it down on the table to say that I shouldn't,

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[9] These summaries of the callers' responses to the survey question were prepared by the advocates who spoke with the victim caller, documenting the caller's statements.

[']cross that line[']. [Law enforcement took his guns away but] "there's no safe [way] to feel because that doesn't stop him from purchasing other guns."

- "He chased me around the house with the gun in his mouth. It had scared me because he had bought another gun after having it taken away."
- "[He] didn't fire the gun but cocked it while it was pointed to my head [text removed for confidentiality]."
- "He will wave a gun in the air when we're in an argument and say 'I will end you with this and put [you] out of your misery.'"
- "He took out the gun and pointed it at my head. He has left them out, has left the ammunition out."
- "Today, during an argument, he had two fully loaded clips on his belt. He later went into his room and came back with the gun on his holster, which was not there before."
- "[My] husband once threatened me with a gun when I once wanted to stay up to finish baking Christmas cookies. He is a control freak, so he didn't want someone to stay up if he was going to bed."

- "He always told me that he would shoot me when I least expected, like in my sleep. There was always a threat."[10]

Other *amici* report receiving similar anecdotal accounts from domestic violence victims. For example, advocates from End Domestic Abuse Wisconsin have reported:

- A victim of ongoing domestic violence was at a family event at a park with her abuser. As the family was leaving because of heavy rain, the victim could not get the vehicle unstuck from the mud. The abuser became enraged. He pointed a gun at her chest and then fired a shot in the air. The abuser was charged for recklessly using a firearm, but not for intentionally threatening the victim.
- After each argument and domestic violence incident, the perpetrator would go into the family basement and "clean his guns." During one such episode, the abuser fired a gun in the home. The abuser claimed this was an accident, but the victim understood the timing and pattern of the abuser's fixating on and use of his guns as clear and intentional threats.[11]

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[10] These are quotes of the chatters' responses to the survey question. They are unaltered except to redact names in order to preserve the confidentiality of the victims' and abusers' identities.

[11] These anecdotal responses are on file with End Domestic Abuse Wisconsin. Pursuant to the terms of the (continued...)

The upshot of *amici's* collected anecdotal evidence is that there are nearly limitless ways in which firearms can be and are used by abusers to further their coercive control over their victims. This does not necessarily entail firing, or even brandishing, a firearm. Consequently, as discussed more fully below, the purpose of prohibiting individuals who have abused a domestic partner from possessing firearms is not simply to *prevent* homicide or other grave physical injury—it is also to allow victims to *live without fear* of their abusers intentionally using a firearm against them or to threaten them.

III. Including Misdemeanor Domestic Violence Crimes with the *Mens Rea* of "Reckless" within the Prohibition on Firearm Possession in 18 U.S.C. § 922(g)(9) Is Crucial to Effectuating That Statute's Remedial Purposes.

The Lautenberg Amendment was intended to "establish a policy of zero tolerance when it comes to guns and domestic violence." 142 Cong. Rec. S10377-01 (1996). "If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established §922(g)(9)." *Voisine*, 778 F.3d at 183. But it did not. "Reckless" crimes of domestic violence were intended to be—

(continued...)
survey with the participants, and to preserve the safety and confidentiality of the participants, all identifying data are kept strictly confidential.

and are—included within the prohibitions of § 922(g)(9).

A. The purpose of § 922(g)(9) is to protect victims of domestic violence from further harm by prohibiting individuals with a demonstrated proclivity towards domestic abuse from possessing firearms.

Prior to the enactment of the Lautenberg Amendment in 1996, Congress had previously restricted two types of domestic abusers from owning firearms. First, 18 U.S.C. § 922(g)(1) prohibited gun ownership from any domestic abuser convicted of a felony. Second, individuals who were "subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury" were similarly precluded from possessing a firearm. 18 U.S.C. § 922(g)(8)(B). In short, prior to enacting section § 922(g)(9), Congress had already banned firearm possession by individuals who had a demonstrated propensity to abuse, intimidate, or harass, among other things.

But this framework left open a "dangerous" loophole that permitted a wide range of domestic abusers to continue possessing firearms. *Hayes*, 555 U.S. at 426. This Court has discussed previously some of the "sobering facts" that led Congress to enact the Lautenberg Amendment. *Castleman*, 134 S. Ct. at 1408-09. Neither § 922(g)(1) nor § 922(g)(8) covered domestic abusers who had been convicted of a misdemeanor for their crime. This loophole was particularly dangerous because "many perpetrators

of domestic violence are convicted only of misdemeanors." *Castleman*, 134 S. Ct. at 1409. Indeed, "'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg)). As Senator Lautenberg further explained:

> At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. Often acts of serious spouse abuse are not even considered as felonies.

142 Cong. Rec. S10377-01 (1996). These facts are explored in greater depth in the Brief of DV LEAP, AEquitas, and Futures Without Violence as *Amici Curiae* in support of Respondent ("DV LEAP Brief"), which *amici* here join in full.

In a nutshell, The Lautenberg Amendment "leaves no doubt that the intent behind the Amendment was to close—completely and without limitation—the loophole in the current law that allowed domestic abusers to possess firearms when properly convicted under misdemeanor statutes for

their acts of abuse." Br. Amici Curiae of United States Senators Frank R. Lautenberg, Dianne Feinstein, and Patty Murray in Support of Petitioner at 9, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608). That previously closed loophole is now at risk of being opened once again.

B. Carving out individuals who have been convicted of a "reckless" crime of domestic violence from the prohibition on firearm possession in § 922(g)(9) would at least partially reopen the loophole that the Amendment was intended to close and would have a devastating effect on domestic violence victims.

Petitioners seek to have the "zero tolerance" policy of the Lautenberg Amendment rewritten to exempt individuals who have been convicted of domestic violence crimes with a *mens rea* of "reckless." This approach is incompatible with the purposes of the Lautenberg Amendment. "The amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts." 142 Cong. Rec. S10377-01 (1996). Allowing an individual who has been convicted of a "reckless" crime of domestic violence to own a firearm merely because one snapshot in time was deemed "reckless" rather than "intentional" fails to account for the intentional and patterned nature of domestic violence. Knowing that their abuser's conduct is deemed to be merely "reckless" would be a cold comfort to victims of domestic violence if they must continue to live in fear in the presence of a firearm.

First, allowing domestic abusers convicted of (or plea bargained to) a "reckless" crime of domestic violence to maintain their firearms would be detrimental to the well-being of these abusers' victims. As described in the above anecdotes, *supra* at 15-18, the ways in which abusers use firearms to maintain power and control over their victims are legion; and many do not involve firing the weapon. Indeed, the mere fact that an abuser has a firearm permit can instill fear in a domestic violence victim. *See* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*, 22 Berkeley J. Gender L. & Just. 2, 8 (2007) ("Another stated 'I have tried to end the relationship, but I am fearful, intimidated Once he came to my office, cried and threatened suicide if I left him. Finally I ended it and since then he makes threats to use any means He has a gun permit.'" (citation omitted)). One district court noted, "a husband can create fear of physical harm against his wife without laying a hand on her, perhaps through verbal threats, nonphysical gestures, or psychological means." *United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 480 (E.D.N.Y. 2011) *aff'd*, 507 F App'x 12 (2d Cir. 2013).[12] Firearms aid abusers in creating such fear,

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[12] *See also Violence*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining domestic violence as "The infliction of physical injury, *or the creation of a reasonable fear that physical injury or harm will be inflicted*, by a parent or a member or former member of a child's household, against a child or against another member of the household" (emphasis added)); *Coercive Control*, *supra*, at 94 ("[A] victim's level of fear derives as much from her perception of what *could* happen based on past experience as from the immediate threat by the perpetrator.").

and individuals who have demonstrated that they are willing to abuse a domestic partner should not be given that opportunity.

Second, the Court should not mistake "reckless" crimes of domestic violence for being somehow less severe than "intentional" crimes of domestic violence. A leading expert in the field has written, "[i]mportantly, the most devastating effects [of domestic violence] [are] as likely to result from routine but minor violence as from life-threatening assaults." *Coercive Control*, *supra*, at 13-14. Indeed, "it is also clear that different acts, perpetrated by one's intimate partner, while individually not alarming, may accumulate to make a cycle of harm that is impenetrable and debilitating." *Domestic Violence and International Law*, *supra*, at 120. Again, a transactional-level approach to domestic violence—such as classifying a single act as "reckless"—simply gets "domestic violence" wrong.

Third, the result urged by Petitioners would eviscerate the remedial purposes of the Lautenberg Amendment in many situations. Simply put, it would allow individuals who have committed *intentional* domestic violence misdemeanors—and even felonies—to possess firearms. As discussed in greater detail in the DV LEAP Brief, many domestic violence crimes are pleaded down to crimes with a "reckless" *mens rea*. *See also Voisine*, 778 F.3d at 184-85; *Fernandez-Ruiz*, 466 F.3d at 1139 (Wardlaw, J., dissenting). Further, as noted by the First Circuit and several judges from the Ninth Circuit, domestic abusers "'may be drunk or otherwise incapacitated when they commit their crimes,'" which could allow these abusers to argue a reduced level of culpability for their behavior. *Id.* (quoting

Fernandez-Ruiz, 466 F.3d at 1139 (Wardlaw, J., dissenting)). Few would argue that it is a good idea to permit such individuals to retain their firearms, but that is exactly what would happen were this Court to find for Petitioners.

In a similar vein, the "categorical approach" also would effectively allow certain individuals who have committed intentional misdemeanor crimes of domestic violence to possess a firearm.[13] This case would be one such example.[14] As Petitioners themselves assert, under the categorical approach, their conduct is assessed based on the least culpable

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[13] Under the "categorical approach," if a predicate statute is divisible—that is, it contains alternative sets of elements—and the record of the underlying proceedings does not provide enough information to determine under which series of elements the defendant was convicted, *all* possible variants of the statute must fit within the crime being prosecuted regardless of the specific facts of the offense. *See Voisine*, 778 F.3d at 179-80. Appendices B and C to the Brief for the United States provide examples of assault or battery statutes containing multiple culpability levels, including recklessness.

[14] At least Petitioner Armstrong's conduct was more severe than the "reckless offensive physical contact" analyzed under the categorical approach here. As noted by the First Circuit in its prior opinion, "Armstrong's wife called the police on or about December 29, 2008, after, as she described to them, she and her husband had gotten into an argument about baking cookies, and Armstrong pushed her. She pushed him back, and the situation escalated until Armstrong hit her 'hard.' Armstrong was charged and convicted of domestic violence assault under Maine's simple assault statute for 'intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to Rosanna Armstrong." *United States v. Armstrong*, 706 F.3d 1, 2-3 (1st Cir. 2013) *cert. granted, judgment vacated*, 134 S. Ct. 1759 (2014).

conduct variant of the statute—here, "reckless offensive physical contact." Pet. Br. 2, 11-12. As such, were Petitioners to prevail, domestic abusers would remain free to retain or procure firearms if they are charged under a statute providing multiple *mens reas* and the charging or plea documents do not specify which *mens rea* they are being charged under or pleading to. Such a result cannot have been intended by the Lautenberg Amendment, which intended to close a "dangerous" loophole in the gun-control laws—"no ifs, ands, or buts." 142 Cong. Rec. S10377-01 (1996).

CONCLUSION

For these reasons, *amici curiae* respectfully submit that the decision of the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondent, and urge this Court to uphold the decision of the First Circuit.

The **National Domestic Violence Hotline** (NDVH or the Hotline) is a not-for-profit organization incorporated in Texas in 1996 to assist victims of domestic violence to find safety, support, and appropriate services (www.ndvh.org). The NDVH's dedicated advocates and staff have been the vital link to safety for women, men, children and families affected by domestic violence, responding to calls 24 hours a day, 7 days a week, and 365 days a year. Currently answering more than 430,000 calls and online contacts per year, the NDVH provides confidential, one-on-one support to each caller, offering crisis intervention, options for next steps and direct connection to resources for immediate safety. The NDVH makes referrals to over 5,000 agencies and resources in communities all across the country. The NDVH is a member of the national Steering Committee of the National Task Force to End Sexual and Domestic Violence, which provides a collective national voice for federal, state and local policy makers and domestic violence advocates. The NDVH has responded to over 3.6 million calls for help since first opening the national hotline, and many of these calls are motivated by the victims' fears of firearm violence at the hands of their intimate partners. These calls inform the NDVH's

efforts to work with other national organizations to promote policies and best practices to address victim safety and support. Additionally, the NDVH serves as the co-chair (with The National Network to End Domestic Violence) of the Domestic Violence and Firearms Group of the National Task Force to End Sexual and Domestic Violence Against Women. The NDVH, on behalf of the millions of callers who have reached out to them since 1996, is interested in ensuring that the Lautenberg Amendment remains a robust tool for protecting the safety of victims of misdemeanor crimes of domestic violence.

The **National Network to End Domestic Violence** (NNEDV), a social change organization, is dedicated to creating a social, political and economic environment in which violence against women no longer exists. NNEDV is the leading voice for domestic violence victims and their advocates. As a membership and advocacy organization representing the 56 state and territorial domestic violence coalitions, allied organizations and supportive individuals, NNEDV works closely with its members to understand the ongoing and emerging needs of domestic violence victims and advocacy programs. Then NNEDV makes sure those needs are heard and understood by policymakers at the national level.

The **Battered Women's Justice Project** (BWJP) is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence (IPV). The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and

perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

End Domestic Abuse Wisconsin (End Abuse) is the leading voice for survivors of domestic violence in Wisconsin. End Abuse is a coalition of domestic violence victim service providers, survivors and concerned individuals, who share a common vision of ending domestic abuse is Wisconsin. Firearms are the most used weapon in Wisconsin domestic violence homicides, more common than all other methods of killings combined. Throughout its over 35-year history, End Abuse has consistently worked to promote rigorous enforcement of firearm safety laws in order to disarm batterers, prevent violence and save lives.

Casa de Esperanza, with National Latin@ Network for Healthy Families and Communities, a project of Casa de Esperanza, is a leading national Latin@ organization. Casa de Esperanza puts community at the center of everything it does. Founded in 1982 to provide emergency shelter for Latinas and other women and children experiencing

domestic violence, today, Casa de Esperanza continues to provide critical and innovative services and support in its Minnesota Twin Cities communities, ranging from family advocacy and shelter services to leadership development and community engagement opportunities for Latin@ youth, women and men, to informing the work of the National Latin@ Network to shape public policy, research, and best practices in the field. The National Latin@ Network provides training and consultations to practitioners and activists throughout the US, as well as in Latin America. Casa de Esperanza and National Latin@ Network organize national and regional events and engage in federal and state public policy advocacy and conduct research on issues that affect Latin@s in the U.S. and abroad.

The **Connecticut Coalition Against Domestic Violence** (CCADV) works to improve social conditions and lead Connecticut's response to domestic violence through policy, advocacy, public awareness, technical assistance, and training. CCADV is a membership organization of Connecticut's 18 domestic violence service agencies that provide critical support to victims including counseling, support groups, emergency shelter, court advocacy, safety planning, and lethality assessment, among other services. Founded in 1978, CCADV works closely with our membership to understand and respond to the on-going needs of domestic violence victims and their families. We seek to support our membership through capacity building, technical assistance and a comprehensive training program. CCADV also works to change social conditions through policy, advocacy, public

awareness and community education. We advocate at a national and state level to create and implement strategic policies that will improve Connecticut's response to domestic violence.

The **First Nations Women's Alliance** seeks to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. It is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in our communities.

Jewish Women International (JWI) is the leading Jewish organization empowering women and girls through economic literacy; community training; healthy relationship education; and the proliferation of women's leadership. JWI's innovative programs, advocacy and philanthropic initiatives protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength. In particular, JWI confronts the issue of violence against women and girls from many sides, from prevention programming for teens and young adults to education and training for thousands of professionals and advocates.

The **Kentucky Coalition Against Domestic Violence** is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered men and women and their children, and provides comprehensive services to families in all one-hundred twenty counties of the Commonwealth,

through fifteen shelter programs located across the state.

Legal Momentum, the Women's Legal Defense and Education Fund, is the oldest women's legal advocacy group in the United States. Legal Momentum served at the helm of the National Task Force to End Sexual and Domestic Violence Against Women, which led efforts to pass the Violence against Women Act (VAWA) in 1994, and its subsequent reauthorizations in 2000, 2005 and 2013. Since VAWA's inception, Legal Momentum has assisted the U.S. Department of Justice, federal agencies, state and local governments, and private entities with developing and implementing policies to protect victims of domestic and intimate partner violence. Additionally, since 1980, Legal Momentum's National Judicial Education Program has educated and trained thousands of judges and court officials nationwide on gender bias issues related to domestic and partner violence.

The **National Coalition Against Domestic Violence** is the voice of victims and survivors. We are the catalyst for changing society to have zero tolerance for domestic violence. We do this by effecting public policy, increasing understanding of the impact of domestic violence, and providing programs and education that drive that change.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions

state that the organization endorses and resolves to work for "Laws, policies, programs, and services that protect every woman from all forms of abuse, exploitation, harassment, and violence." Consistent with our Priorities and Resolutions, NCJW joins this brief.

The **National Network to End Domestic Violence** (NNEDV) is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates, NNEDV comprises a network of 56 state and territorial coalitions against domestic violence representing over 2,000 local organizations that provide shelter, advocacy, and counseling and legal services to victims and survivors of domestic violence and their families.

The **National Organization for Women Foundation** is a 501(c)(3) education and litigation organization founded in 1987 to promote equal rights for women of women and for decades has worked to end domestic violence against women.

Since 1993, the **National Resource Center on Domestic Violence** (NRCDV) has provided comprehensive and individualized technical assistance, training and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multi-disciplinary approaches, and a commitment to ensuring that policy, practice and research is grounded in and guided by the voices and

experiences of domestic violence survivors and advocates.

The **Nevada Network Against Domestic Violence** provides statewide advocacy, education and support of the front-line organizations that help those impacted by domestic violence.

The **New Hampshire Coalition Against Domestic and Sexual Violence** creates safe and just communities through advocacy, prevention and empowerment of anyone affected by sexual violence, domestic violence and stalking.

The **New Jersey Coalition to End Domestic Violence** provides leadership, support and resources on the prevention of domestic violence for all victims in New Jersey through advocacy, education and training, technical assistance and community awareness.

Praxis International is a nonprofit corporation, which works towards the elimination of violence in the lives of women and their children. It is the mission of Praxis International to join with other progressive social change organizations and programs to work toward the elimination of oppression in our society. Specifically, Praxis focuses on the many ways that violence is used to subjugate women.

The **Vermont Network Against Domestic and Sexual Violence** is a coalition of 14 member domestic and sexual violence agencies throughout the state.

The **Washington State Coalition Against Domestic Violence** (WSCADV) is a statewide membership organization of over 70 domestic

violence victim advocacy programs and shelters across Washington State. The mission of WSCADV is to end domestic violence through advocacy and action for social change.

No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, EASTERN BAND OF CHEROKEE INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, NOTTAWESEPPI HURON BAND OF THE POTAWATOMI, SEMINOLE NATION, TULALIP TRIBES AND OTHER NATIVE ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI

Petitioner's assertion that 18 U.S.C. § 922(g)(9)'s federal firearm prohibition does not reach all persons convicted of domestic violence crimes compels the *Amici* identified herein to offer their view on the grave danger that Native women will face if § 922(g)(9) is interpreted to exclude reckless criminal conduct.[1]

The leading signatory, National Indigenous Women's Resource Center, Inc. ("NIWRC"), is a Native nonprofit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States; collectively, these women have extensive experience in governmental, programmatic, and educational work to end domestic violence against Native women and their children.

NIWRC is joined by five additional Indian Nations that have invested significant resources, time, and effort to ensure that their prosecutions of domestic violence crimes serve to increase the safety of their tribal communities, while simultaneously working to ensure that the rights of the domestic violence

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On December 18 and 22, 2015, counsel for Respondent and Petitioners, respectively, informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

defendants in tribal criminal proceedings are respected and enforced.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") is a union of three tribes—Cayuse, Umatilla, and Walla Walla—and has 2,965 tribal members. The Umatilla Indian Reservation is about 172,000 acres located in Oregon. The CTUIR was the first jurisdiction in the nation, along with the State of Ohio, to implement the Adam Walsh Act in 2009. In March of 2011, the CTUIR implemented felony sentencing under the Tribal Law and Order Act of 2010 and has since prosecuted numerous felony cases. In July of 2013, the CTUIR implemented all necessary provisions of VAWA § 904's special domestic violence criminal jurisdiction ("SDVCJ"), and was approved for early exercise of that authority in February of 2014. Since implementing § 904 of VAWA, the CTUIR has prosecuted SDVCJ cases for acts of domestic violence committed on the Umatilla Indian Reservation by non-Indians against Indian women.

The Eastern Band of Cherokee Indians is an Indian Nation based in the mountains of Western North Carolina comprised of the descendants of Cherokees who avoided forced removal along the Trail of Tears, or returned from the Indian Territory after the march. About 8,500 Eastern Band Cherokees live on the Eastern Band Cherokee Reservation. On June 15, 2015, the Eastern Band implemented VAWA's § 904's SDVCJ.

Little Traverse Bay Bands of Odawa Indians ("LTBB") is a federally recognized Tribe with a reservation located in Harbor Springs, Michigan. LTBB's population is about 4,500, with 677 Tribal Citizens residing on the LTBB's reservation. On March 7, 2015, LTBB implemented VAWA § 904's

SDVCJ. Accordingly, LTBB may prosecute SDVCJ for acts of domestic violence committed on LTBB's lands. LTBB's definition of "domestic violence" does not articulate a specific *mens rea* and instead relies on the "reasonable person standard." Consequently, LTBB has a strong interest in ensuring this Court's decision respects the deference Congress intended to give to State and Tribal Governments in deciding whether to articulate a particular *mens rea* requirement in creating their own criminal laws.

The Nottawaseppi Huron Band of the Potawatomi ("NHBP" or the "Tribe") is a federally-recognized American Indian Tribe with approximately 1,100 enrolled Tribal Citizens. The Tribe's Health Center serves Tribal Citizens, non-NHBP Citizen Indians/descendants of other federally-recognized Indian Tribes, and employees who are not Tribal Citizens and their dependents. NHBP exercises jurisdiction over Reservation lands upon which the Tribal government facilities, residential housing, parks/recreation facilities, and various economic enterprises are found, all within the borders of what is now called the State of Michigan. The Tribe currently prosecutes crimes of domestic violence under the Nottawaseppi Huron Band of Potawatomi Indians Law and Order Code. NHBP has participated in the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction since its inception and is in the final stages of implementing VAWA § 904's SDVCJ.

The Seminole Nation is a federally recognized Tribe located in present day Oklahoma. Seminole Nation's population is about 18,800 and growing. The Seminole Nation is located in Seminole County Oklahoma. On July 16, 2015, Seminole Nation implemented VAWA §

904's SDVCJ, and as a result, Seminole Nation is now able to prosecute SDVCJ cases for acts of domestic violence committed on Seminole Nation's lands.

The Tulalip Tribes ("Tulalip") are the successors in interest to the Snohomish, Snoqualmie, Skykomish and other allied tribes and bands signatory to the 1855 Treaty of Point Elliott. Tulalip's population is about 4,000 and growing, with 2,500 members residing on the 22,000 acre Tulalip Indian Reservation located north of Everett and the Snohomish River and west of Marysville, Washington. On February 20, 2014, the Tulalip Tribes implemented VAWA § 904's SDVCJ, as a Pilot Project Tribe. Since then, Tulalip has prosecuted SDVCJ for acts of domestic violence committed on Tulalip's lands.

The aforementioned *Amici* are joined by eighteen Native nonprofit organizations working to strengthen the ability of Tribal Nations and Tribal Courts to end domestic violence against Native women.[2] The *Amici*'s collective experience render them uniquely positioned to offer their perspective on the danger Native women will face if this Court were to exclude reckless acts of domestic violence from § 922(g)(9). Indeed, Petitioner's requested incorporation of a federal *mens rea* requirement into § 922(g)(9) threatens to leave firearms in the hands of individuals who are known to abuse, harm, and threaten the lives of Native women.

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[2] The eighteen additional organizational *Amici* are identified and listed in Appendix A to this brief.

SUMMARY OF THE ARGUMENT

The next day after my Tribal Court issued my order of protection, I was at work when I saw him pull up in a red truck. My ex-husband walked in to my office and told me: "you promised until death due us part so death it shall be." He was armed with a 9MM gun. If not for my very brave co-worker I would not be alive today. My co-worker prevented my murder by pushing me out of harm's way and took the bullet in his shoulder. Although my ex-husband beat me on numerous occasions, he was never once charged or convicted of having committed a "knowing" or "intentional" crime.

Survivor Diane Millich (Southern Ute Indian Tribe)

Petitioners assert that the phrase "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9) (the "Lautenberg Amendment") must be interpreted to include only those domestic violence crimes that involve a *mens rea* greater than recklessness. Petitioners are wrong. The text of the statute contains no *mens rea* requirement; accordingly, the analysis should begin and end there.

Instead of limiting § 922(g)(9)'s application to domestic violence crimes labeled as "intentional" or "knowing," Congress left the determination of *mens rea* for States and Tribal Nations to decide. Petitioners, however, offer a myriad of arguments to support their assertion that although Congress did not include a threshold *mens rea* requirement in § 922(g)(9), it intended to. None of Petitioners' arguments are compelling.

Petitioners' primary argument for excluding reckless crimes from § 922(g)(9)'s reach is based on an analysis of archaic nineteenth century laws that carry no analog to current domestic violence crimes. In contrast to the majority of criminal laws in the United States today, the crime of domestic violence has no roots in colonial times, nor is the crime found in traditional English jurisprudence.[3] Until very recently—within the last few decades—most non-tribal jurisdictions in the United States did not consider domestic violence to be a crime.[4] Instead, the law in many States protected a husband's right to abuse his wife.[5] Indeed, States did not begin to pass

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[3] *See* Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 Yale L.J. 2117, 2118 (1996) ("The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her.").

[4] *See id.* at 2125, n.25 (1996) (listing "a number of states . . . [that] recognized a husband's prerogative to chastise his wife" under the law); *see also* Machaela M. Hoctor, *Domestic Violence As A Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 647 (1997) ("The criminal justice system has only recently attempted to address this epidemic of domestic violence.").

[5] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444-45 (8th ed.1778) ("The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children."); *see, e.g., State v. Black*, 60 N.C. (Win.) 266, 267 (1864) (permitting a husband "to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain"); *Robbins*

and enforce laws treating the act of domestic violence as an actual "crime" until the late 1970s.[6]

Thus, the articulation of domestic violence as a crime in the late twentieth century constitutes a purposeful departure from, and reversal of, established American jurisprudence. Petitioners, however, assert that § 922(g)(9)'s phrase "misdemeanor crime of domestic violence" must be construed to require the same *mens rea* as nineteenth century common law battery. *See* Pet'r Br. 17 (asserting that the Lautenberg Amendment must require the same *mens rea* as "the common-law misdemeanor of battery [which] required a *mens rea* greater than recklessness"). Perversely, the historical laws that Petitioner relies on criminalized acts of violence perpetrated against strangers, but considered those same violent acts

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v. State, 20 Ala. 36, 39 (1852) ([I]f the husband was at the time . . . provoked to this unmanly act by the bad behavior and misconduct of his wife, he should not be visited with the same punishment as if he had without provocation wantonly . ").

[6] *See* Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. Rev. 397, 404 (2015) ("Although a husband's right to subject his wife to corporal punishment had been abrogated by the end of the nineteenth century, rhetoric of marital privacy and domestic harmony continued to frame violence against women as a personal matter that did not concern the criminal justice system until the 1970s.").

lawful when perpetrated against a woman in her home.[7]

The *crime* of domestic violence, therefore, cannot and should not be construed as congruent with nineteenth century laws that protected the *practice* of domestic violence as lawful. Domestic violence is a crime that must be interpreted through the lens of the lawmakers who created it—and not through the lens of archaic laws that failed to recognize its existence.

Petitioners' insistence that nineteenth century battery laws should limit the scope of § 922(g)(9)'s contemporary application to domestic violence crimes is further belied by Congress' addition of tribal court convictions to the Lautenberg Amendment in 2006.[8] Unlike nineteenth century Anglo-common law, many contemporaneous tribal laws strictly forbade violence against women.[9] The stark contrast between

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[7] *Compare State v. Gibson*, 32 N.C. (1 Ired.) 214, 215 (1849) ("[I]n cases of battery merely, the party, who strikes another, must be guilty, unless he be justified in committing it, as an act of self-defence") *with State v. Oliver*, 70 N.C. 60, 61-62 (N.C. 1874) ("If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.")

[8] In 2006, as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress amended § 921(a)(33)(A)(i)) to include domestic violence offenders convicted under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, § 908(a), 119 Stat. 3083 (2006).

[9] Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* 21-22 (2015) (noting that domestic violence was not protected as lawful by tribal law and instead, "tribal systems provided a powerful system of social checks and balances that held offenders accountable for their

nineteenth century tribal laws forbidding violence against women and the historic laws in many States that declared domestic violence to be a lawful exception to battery makes clear that in creating § 922(g)(9), Congress did not conceive of domestic violence as a crime rooted exclusively in nineteenth century common-law battery. Instead, in adding tribal court convictions to the Lautenberg Amendment, Congress recognized that Tribal Nations have the inherent right to define domestic violence as a crime within their own jurisdictions.

Furthermore, although tribal jurisdictions historically considered violence against women to be a serious offense, when Congress added tribal court convictions to the Lautenberg Amendment in 2006, federal law prohibited Indian Nations from treating domestic violence as anything more serious than a misdemeanor. That is, the Indian Civil Rights Act ("ICRA") precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense, including domestic violence. 25 U.S.C.

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behavior" when they abused Native women); *see also, e.g.*, Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 1 St. John's L. Rev. 69 (1995), http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1634&context=lawreview (noting that "[u]nder Navajo common law, violence toward women, or mistreatment of them in any way, is illegal" and that, historically, Lakota law did not tolerate violence against women in the community, and "[a] man who battered his wife was considered irrational and thus . [h]e could not be trusted to behave properly. . . . He was thought of as contrary to Lakota law and lost many privileges of life and many roles in Lakota society and the societies within the society.").

§ 1302(7) (2006).[10] Thus, at the time of the 2006 addition of tribal court convictions to the Lautenberg Amendment, Congress knew that because of the one-year sentencing limitation ICRA then imposed, no tribal court conviction could ever qualify for the felony federal firearm prohibition in 18 U.S.C. § 922(g)(1).

Simply put, nothing in the plain text or legislative history of the Lautenberg Amendment supports Petitioners' request for the addition of a federal *mens rea* requirement. Instead, Congress intended to allow States and Tribal Nations to fashion their own criminal laws. Accordingly, many Indian Nations have codified criminal laws that, like the contemporary laws in their neighboring state jurisdictions, recognize domestic violence as a crime that can be committed without a heightened "intentional" or "knowing" *mens rea*, or at a minimum, with a "conscious disregard" for the safety of their intimate partner, known as "recklessness."[11]

Domestic violence is not a crime committed by accident. Although Petitioners attempt to conflate accidental conduct with recklessness, a review of Tribal Codes reveals that tribal domestic violence

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[10] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261, amended ICRA to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. *Id.* § 234, 124 Stat. at 2279-80. To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in TLOA.

[11] A sample of Tribal Codes that demonstrate the variance of tribal law in defining and prosecuting domestic violence crimes are identified and listed in Appendix B, Tribal Codes Addressing Domestic Violence Crimes ("Appendix of Tribal Codes").

crimes are not commensurate with accidents. Appendix B, Tribal Codes Addressing Domestic Violence Crimes ("Appendix of Tribal Codes"). Reckless domestic violence crimes require a "conscious disregard" for the safety of the perpetrator's intimate partner (*see id.*), and consequently, Petitioners attempt to characterize reckless domestic violence crimes as mere accidents cannot be reconciled with actual law.

Domestic violence constitutes a widespread, serious threat to the health and welfare of Indian Nations today. The conclusion that Congress intended to limit § 922(g)(9) to *intentional* acts of domestic violence would severely limit the Lautenberg Amendment's application to convictions in Tribal Courts and would place a large number of Native women in danger. This is not what Congress intended.

ARGUMENT

I. Nothing in the Plain Text of the Statute Renders the Application of § 922(g)(9) Contingent upon a Particular *Mens Rea*

The plain text of the statute makes clear that § 922(g)(9)'s prohibition on firearms applies broadly to "any person" convicted in "any court" of a "misdemeanor crime of domestic violence," leaving the appropriate mental state of the abuser to the prosecuting State or Tribal Government to decide. That is, Congress elected *not* to make § 922(g)(9)'s application contingent upon a finding that the underlying conviction involved, as a requisite element, a particular *mens rea*.

The plain text of the Lautenberg Amendment states:

> It shall be unlawful for *any person* . . . who has been convicted in *any court* of a *misdemeanor crime of domestic violence*, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (emphasis added). Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" to mean an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the *use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A) (emphasis added). Section 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" is void of reference to a *mens rea* requirement.

This omission is particularly telling because Congress affirmatively identified the *actus reus* required in § 922(g)(9). Specifically, Congress limited § 922(g)(9) to acts that have, "as an element, the use or attempted use of physical force. . . ." 18 U.S.C. § 921(a)(33)(A). Congress' decision to articulate the

actus reus renders its silence as to *mens rea* all the more profound. Indeed, this Court has dispensed with the notion that "scienter [i]s a necessary element in the indictment and proof of every crime," and consequently, where Congress elects to criminalize conduct based on an *actus reus* alone, this Court refrains from imposing its own threshold *mens rea*. *See United States v. Balint*, 258 U.S. 250, 251-52 (1922); *see also United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (declining to impose a minimum *mens rea* requirement in a provision of the Federal Food, Drug, and Cosmetic Act that barred the interstate transport of mislabeled drugs where Congress defined the *actus reus* but not the *mens rea*). Because the Lautenberg Amendment imposes "penalties [that] serve as effective means of regulation of a public harm," this Court should not interpret the statute's silence as to *mens rea* as a reason to require defendants to evidence some "awareness of some wrongdoing." *Dotterweich*, 320 U.S. at 280-81.

Indeed, if Congress had wanted to impose a threshold *mens rea*, it would have done so explicitly, as it did in the section immediately preceding the bill that established § 922(g)(9). The provision enacting § 922(g)(9) is found at § 658 of the Omnibus Consolidated Appropriations Act of 1997. *See* Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104–208, § 658, 110 Stat. 3009, 3009–371 to –372 (1997). Section 657 of that Act amended 18 U.S.C. § 922(q), wherein Congress made it "unlawful for any individual *knowingly* to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* § 657, 110 Stat. at 3009–369 to –371 (emphasis added).

Thus, Congress has, in other instances, rendered its prohibition on firearms contingent upon a finding of a particular *mens rea*. However, in this instance Congress elected not to. Contrary to Petitioners' assertions, the Lautenberg Amendment's silence regarding a threshold *mens rea* requirement is not an invitation to invent one.

II. Congress Intended for § 922(g)(9) to Apply to All Domestic Violence Convictions, Regardless of the Underlying *Mens Rea*

Even if the text of § 922(g)(9) and § 921(a)(33)(A) could be construed as vague or ambiguous—it cannot—the legislative history and subsequent evolution of the Lautenberg Amendment make clear that Congress did not intend for its firearm ban to apply only to those individuals who commit domestic violence crimes with a *mens rea* greater than recklessness.

A. The Addition of Tribal Court Convictions in 2006 Supports a Plain Text Reading of the Statute

Congress' decision to add tribal court convictions to § 922(g)(9)'s firearm prohibition in 2006—without mention of a specific *mens rea*— further solidifies the plain text reading of the Lautenberg Amendment.

In 2005-2006, Congress addressed the lack of protections for Native women against domestic violence. As part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress amended § 921(a)(33)(A)(i) to include offenders convicted under tribal law. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, § 908(a), 119

Stat. 3083 (2006). Today, § 921(a)(33)(A)(i) defines § 922(g)(9)'s "misdemeanor crime of domestic violence" to mean "a misdemeanor under Federal, State, or *Tribal law*." 18 U.S.C. § 921(a)(33)(A)(i) (emphasis added).

When Senator McCain introduced the Restoring Safety to Indian Women Act in the 2005-2006 re-authorization of VAWA, Senator McCain explained the congressional purpose behind the new tribal provisions as follows:

> Since 1999, the Department of Justice has issued various studies which report that Indian women experience the highest rates of domestic violence compared to all other groups in the United States. These reports state that one out of every three Indian women are victims of sexual assault; that from 1979 to 1992, homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and that 75 percent of those deaths were committed by a family member or acquaintance. These are startling statistics that require our close examination and a better understanding of how to prevent and respond to domestic violence in Indian Country.

151 Cong. Rec. S4,873 (daily ed. May 10, 2005) (statement of Sen. McCain). Senator McCain further noted that "[d]om-estic violence is a national problem and not one that is unique to Indian Country." *Id.* However, "due to the unique status of Indian tribes," Tribal Governments face numerous legal "obstacles" in working to protect Native women from domestic violence and homicide. *Id.* Congress therefore "intended to remove these" obstacles when it added

the tribal provisions to the 2006 reauthorization of VAWA. *Id.* Nothing in the legislative history supports the notion that Congress intended to limit § 922(g)(9)'s application to tribal domestic violence convictions for crimes committed "knowingly" or "intentionally."

Instead, the legislative history reveals that Congress considered its addition of tribal court convictions to § 922(g)(9)'s prohibition on firearms to constitute a critical protection for Native women survivors of domestic violence—no matter how the crime may have been prosecuted or labeled. "[A]ll too often," one Senator noted during the debate over § 922(g)(9), "the only difference between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. 22,986 (1996) (statement of Sen. Wellstone). As this Court has acknowledged, "'When a gun [i]s in the house, an abused woman [i]s 6 times more likely than other abused women to be killed.'" *United States v. Castleman*, 134 S. Ct. 1405, 1408-09 (2014) (quoting Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003)). "Not surprisingly, research has found that the presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide.'" *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011) (quoting Arthur L. Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084, 1087 (1993)) (additional internal citation and quotation marks omitted).

Domestic violence and gun access present a uniquely deadly combination because of the crime's intimate dynamics. Over time, domestic violence typically escalates in both frequency and severity since at its

core, "domestic violence is about gaining control of another person."[12] An abuser's need to control his/her intimate partner drives a pattern of recurring, worsening behaviors. The first incident of abuse is usually not the last, and when less abusive acts fail to achieve sufficient control, a perpetrator moves on to more dangerous acts.[13] Section 922(g)(9), therefore, constitutes a critical intervention to ensure that if and when a domestic violence offender resorts to more dangerous acts, a firearm is not at his disposal.

For Native women, however, the lethal threat a gun imposes in the home of a domestic violence perpetrator is especially severe given that guns are involved in over one-third of homicides against Native women (approximately 35 percent).[14] In adding tribal domestic violence convictions to the Lautenberg

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[12] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) (articulating "coercive control" theory of domestic violence, which frames "woman battering . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

[13] *See, e.g.*, Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987) ("The first instance of violence . . is usually short and not terribly severe . . Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be . . . too afraid to change the situation alone.").

[14] Ronet Backman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known*, U.S. Dep't of Justice 23 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

Amendment's firearm proscription, Senator McCain noted "that Indian women experience the highest rates of domestic violence compared to all other groups in the United States." 151 Cong. Rec. S4,873 (daily ed. May 10, 2005) (statement of Sen. McCain). That is, nationwide, "one in four women are victims of domestic violence." *Id.* Native women, however, experience rates of violence *more than twice* the United States national average.[15] The crisis that Native women face cannot be overstated; on some reservations, Native women are murdered at more than ten times the national average.[16]

Furthermore, perpetrators who rape and sexually assault Native women are far more likely to use a weapon than perpetrators who assault women of other ethnic or racial groups.[17] Between 1992 and 2005, "American Indian and Alaska Native women were over two times as likely to face an armed offender compared to other women" (twenty-five percent for Native women versus nine percent for all races).[18] Given the high rates of abuse, violence, and homicide that Native women experience, the presence of a gun in the home of an individual convicted of abusing a Native woman creates a serious threat that the Native

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[15] *See* Lawrence A. Greenfeld & Steven K. Smith, *American Indians and Crime*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 173386, at v (1999).

[16] *SAVE Native Women Act: Hearing on S. 1763 Before the S. Comm. on Indian Affairs*, 112th Cong. 10 (2011) (statement of Thomas J. Perrelli, Associate Att'y Gen. of the United States) (citing a National Institute of Justice-funded analysis of death certificates), http://www.indian.senate.gov/sites/default/files/upload/files/TranscriptRecord-2.pdf.

[17] Backman, *supra*, at 37.

[18] *Id.*

woman—or her children—will be killed. Congress recognized this threat when it added tribal convictions to § 922(g)(9) in 2006. *See* 151 Cong. Rec. S4,873 (daily ed. May 10, 2005) (statement of Sen. McCain).

Thus, Congress' failure to exclude reckless crimes of domestic violence when it amended § 922(g)(9) to add tribal court convictions further defeats Petitioners' strained interpretation of the statute. The fact that reckless crimes of domestic violence were—and continue to be—routinely prosecuted under "Tribal Law" was and is clear from the face of readily attainable law in numerous Tribal Codes. *See* Appendix of Tribal Codes. Nor can Petitioners claim Congress was oblivious to the existence of tribal prosecutions of domestic violence crimes without a "knowing" or "intentional" *mens rea*, as this Court "assume[s] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law."). Thus, Congress could have added a threshold *mens rea* requirement to ensure that tribal convictions for reckless domestic violence did not trigger the federal firearm prohibition. Instead, Congress maintained the Lautenberg Amendment's exclusive focus on the *actus reus* of domestic violence and once again declined to set a threshold *mens rea* requirement.

Nothing in the plain text or legislative history of the 2006 amendment, therefore, supports the notion that in adding tribal court convictions to § 922(g)(9), Congress intended to limit the statute's firearm prohibition to those tribal court convictions that contain the requisite intentional *mens rea* element to

establish nineteenth century common-law battery. Petitioners' argument that reckless crimes of domestic violence must be excluded from the Lautenberg Amendment's firearm prohibition holds grave consequences for Indian Nations and the Native women they seek to protect. Because Native women face rates of domestic violence and abuse higher than any other group or population in the United States, allowing their abusers to possess firearms will significantly increase the likelihood that their lives will be taken.

B. Congress Intended for the "Misdemeanor Crime of Domestic Violence" Standard to Apply to Crimes Not Covered by Armed Career Criminal Act's Felony Firearm Prohibition

Petitioners' argument that § 922(g)(9) does not cover reckless crimes of domestic violence is further undermined by the fact that Congress enacted the Lautenberg Amendment to fill a specific void. Prior to the enactment of the Lautenberg Amendment, § 922(g)(1) of the Armed Career Criminal Act ("ACCA") "prohibited firearm possession by convicted felons." *United States v. Armstrong*, 706 F.3d 1, 4 (1st Cir. 2013), *granted, judgment vacated*, 134 S. Ct. 1759 (2014). However, as Congress noted, in most jurisdictions, "acts of serious spouse abuse are not even considered felonies." 142 Cong. Rec. S8,831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg). Petitioners' addition of a stringent *mens rea* to § 922(g)(9) would, therefore, render the Lautenberg Amendment's firearm proscription inapplicable to many domestic violence criminals whose crimes do not fall within the scope of § 922(g)(1) simply because they are prosecuted as misdemeanors and not felonies. This is not what Congress intended.

Specifically, ACCA § 922(g)(1) states that it is unlawful for anyone "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to possess, ship, transport, or receive firearms. 18 U.S.C. § 922(g)(1); *see also United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014) ("While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors."); *Johnson v. United States*, 559 U.S. 133, 152-53 (2010) (Alito, J., dissenting) ("Congress recognized that many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," and Congress therefore enacted the Lautenberg Amendment "to keep firearms out of the hands of such abusers.") (citations omitted).

Congress thus acted to close a "dangerous loophole" and "establish[ ] a policy of zero tolerance when it comes to guns and domestic violence." 142 Cong. Rec. S8,831-32 (daily ed. July 25, 1996) (statement of Sen. Lautenberg). In closing the loophole left open in the ACCA, Congress defined the scope of § 922(g)(9)'s firearm prohibition as applicable to all "misdemeanor crime[s] of domestic violence" and specifically declined to repeat or incorporate § 922(g)(1)'s threshold "felony" standard.

Prior to 2006, this "dangerous loophole" was even more evident in the absence of any federal firearm prohibitions for individuals convicted of abusing Native women. Before the addition of tribal court convictions to § 921(a)(33)(A) and § 922(g)(9) in 2006, the ACCA's felony limitation, coupled with the tribal sentencing limitations imposed by federal law, prevented any federal firearm prohibition from applying to individuals convicted in Tribal Courts of

abusing Native women. At the time of the ACCA's enactment (and again at the time of the Lautenberg Amendment), ICRA precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense. 25 U.S.C. § 1302(7) (2006).[19] Consequently, tribal convictions for domestic violence could not, as a matter of law, fall within ACCA § 922(g)(1)'s pre-existing prohibition for felons convicted of "a crime punishable by imprisonment for a term exceeding one year," nor did tribal convictions qualify for § 922(g)(9)'s prohibition. *See* 18 U.S.C. § 921 (effective Sept. 30, 1996 to Jan. 4, 2006) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that—(i) is a misdemeanor under Federal or State law"); *see also United States v. First*, 731 F.3d 998, 1007 (9th Cir. 2013) ("The first decade after its enactment, § 921(a)(33)(A) did not include tribal convictions within the ambit of its proscription.").

Thus, before 2006, no federal law prohibited an individual convicted of domestic violence in a Tribal Court from possessing, shipping, transporting, or receiving firearms. This legal framework allowed perpetrators to abuse Native women and "escape felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9,062 (2005) (statement of Sen. McCain).

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[19] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261, amended ICRA to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. *Id.* § 234, 124 Stat. at 2279-80. To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in TLOA.

In enacting the Lautenberg Amendment and the 2006 amendment to include tribal convictions, Congress decisively went beyond the ACCA's "violent felony" standard to ensure that *all* individuals convicted of domestic violence, "no matter how [their crime] is labeled" (142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg)), would be prohibited from possessing firearms. *See United States v. Armstrong*, 706 F.3d at 5, *vacated*, 134 S. Ct. 1759 (2014) ("Whereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence.") (citation and quotation marks omitted).

The deliberate addition of tribal court convictions to the Lautenberg Amendment in 2006 only serves to further separate the purpose of ACCA's felony prohibitions from the Lautenberg Amendment's domestic violence prohibitions. Indeed, Petitioners' interpretation would remove many Native women survivors of domestic abuse from § 922(g)(9)'s protection—a result Congress never intended.

C. In Crafting the Lautenberg Amendment's "Misdemeanor Crime of Domestic Violence" Standard, Congress Rejected 18 U.S.C. § 16's "Crime of Violence" Standard

Petitioners further ask this Court to apply its prior decision in *Leocal*, where the Court concluded that Congress did not intend for the "crime of violence" standard in 18 U.S.C. § 16 to reach individuals convicted of a crime committed with recklessness. *See*

Leocal v. United States, 543 U.S. 1, 10 (2004). Petitioners assert that the holding in *Leocal* regarding "recklessness" must control here because "following *Leocal*, almost all federal courts of appeals have held that crimes involving reckless conduct do not meet the definition of 'use . . . of physical force.'" Pet'r Br. 10. Because the words "use . . . of physical force" appear in § 921(a)(33)(A)(ii), Petitioners assert that this Court's decision in *Leocal* limits the scope of § 922(g)(9)'s firearm prohibition to individuals convicted of intentional or knowing acts of domestic violence.

However, none of the appellate courts Petitioners cite have considered the term "use . . . of physical force" within the context of § 922(g)(9). That is, no appellate court has concluded that "use" in the context of a federal criminal domestic violence statute precludes reckless conduct. When viewing the words "use . . . of physical force" in isolation, Petitioners' argument may seem plausible. But when considered in the context of a late twentieth century statute that was initially predicated on state jurisdictions that, until very recently, did not conceive of domestic violence as a crime, it becomes clear that Petitioners' reliance on the repetition of four words from a separate federal statute overlooks the plain language of the Lautenberg Amendment, as well as its fundamental purpose.

As this Court noted in *Leocal*, "when interpreting a statute featuring as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 2. The context of § 922(g)(9) is unique and separates the statute's use of the word "use" from other statutes that do not deal with domestic violence. As Congress noted, "[b]y their nature, acts of domestic violence are

especially dangerous and require special attention." 142 Cong. Rec. S8,832 (daily ed. July 25, 1996) (statement of Sen. Lautenberg). In contrast to other crimes of violence, domestic violence "crimes involve people who have a history together and perhaps share a home or a child. These are not violent acts between strangers, and they don't arise from a chance meeting." *Id.*

The *Leocal* Court's conclusion that the phrase "use . . . of physical force" precludes reckless conduct for purposes of 18 U.S.C. § 16's enumerated crimes—crimes that do not necessarily implicate intimate relationships and have long been recognized as crimes in American jurisprudence—does not support the conclusion that the phrase "use . . . of physical force" eliminates reckless conduct for purposes of the Lautenberg Amendment. In *Leocal*, this Court cautioned that "[i]n construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Leocal*, 543 U.S. at 11.

In contrast, when Congress created the standard for the Lautenberg Amendment, Congress specifically rejected the term "crime of violence" found in 18 U.S.C. § 16. Instead, Congress replaced that language with the term "misdemeanor crime of domestic violence," a term Congress considered to be "broader." *See* 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg); *see also* 18 U.S.C. § 922(g)(9) (prohibiting the possession of firearms for anyone "who has been convicted in any court of a *misdemeanor crime of domestic violence*") (emphasis added). Senator Lautenberg explained the distinction as follows:

> [T]he revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence . . . . [but here we] agree[d on] a new definition of covered crimes that is more precise, and probably broader.

142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

Although the *Leocal* Court interpreted the word "use" within the context of what Congress considered to be a "crime of violence," this Court has yet to construe "use" within the context of what Congress has defined to be a "misdemeanor crime of domestic violence." *See, e.g., Johnson v. United States*, 559 U.S. 133, 143-44 (2010) (considering the phrase "the use . . . of physical force" in a separate provision, 18 U.S.C. § 924(e)(2)(B)(i), and declining to extend the Court's holding and "decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence.").

D. Congress Did Not Intend to Limit the Lautenberg Amendment to Common-Law Battery

In an attempt to further distract from the plain text of the Lautenberg Amendment, Petitioners assert that because "the common-law misdemeanor of battery required a *mens rea* greater than recklessness" (Pet'r Br. 17), § 922(g)(9) must be interpreted as applying only to domestic violence crimes with an equivalent *mens rea*. In support of this proposition, Petitioners cite a series of state court decisions wherein common-law battery was held to require an intentional *mens rea*. *See* Pet'r Br. 16-17. The perversity of this line of

argument, however, is that these very same laws precluded the criminal prosecution of a husband for abusing his wife.[20]

Contemporary laws criminalizing domestic violence therefore mark an important and intentional shift away from traditional American jurisprudence. This shift was not yet complete at the time of the Lautenberg Amendment, since in 1996 "only about one-third of the States had criminal statutes that specifically proscribed domestic violence." *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citation omitted). It is unfathomable that, at that time, Congress intended for its use of the words "use . . . of physical force" in defining the term "misdemeanor crime of domestic violence" to render the statute's application equivalent to a nineteenth century regime that deemed domestic violence to be lawful.

Petitioners' reading of § 922(g)(9) is even further constrained in light of Congress's 2006 decision to add tribal court convictions to the Lautenberg Amendment's firearm prohibition. Tribal laws criminalizing domestic violence trace their roots not to common-law battery, but rather, to "indigenous legal systems" that "were victim centered" and "generally provide[d] more protection and healing to victims than the American system."[21]

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[20] *See* Siegel, *supra*, at 2123 (noting that under nineteenth century common-law, the then prevailing law in many States held that "[a]s master of the household, a husband could command his wife's obedience, and subject her to corporal punishment or chastisement if she defied his authority.") (citation and quotation marks omitted).

[21] Deer, supra, at 22.

This Court has previously concluded that federal statutes prohibiting convicted criminals from possessing firearms must be construed as "'consistent with the prerogatives of the States in defining their own [criminal] offenses.'" *Taylor v. United States*, 495 U.S. 575, 582 (1990) (quoting S.Rep. No. 98–190, at 20 (1983)). By adding tribal court convictions to the Lautenberg Amendment in 2006, Congress likewise intended for § 922(g)(9) to be construed as consistent with the prerogatives of Tribal Nations in defining their own domestic violence criminal offenses. Nineteenth century common-law battery laws are not consistent with contemporaneous tribal laws that prohibited violence against Native women, and as such, common-law battery does not constitute a permissible substitute for the plain language of the Lautenberg Amendment.

III. Tribal Codes that Prosecute for Reckless Crimes of Domestic Violence Fall Well-Within § 922(g)(9)'s Intended Scope

As the Appendix of Tribal Codes demonstrates, tribal laws—like state laws—vary from jurisdiction to jurisdiction. There is no "one size fits all" definition of domestic violence in Indian country with regards to *mens rea*. *See* Appendix of Tribal Codes. Of course, Congress never intended to impose a "one size fits all" *mens rea* standard to § 922(g)(9)'s application, as demonstrated by Congress' decision to make the statute applicable to all misdemeanor crimes of domestic violence.

Furthermore, many of the Tribal Codes that allow for the prosecution of reckless domestic violence crimes establish a threshold "conscious disregard"

element that places tribal domestic violence convictions well above the description of domestic violence Congress itself used to describe § 922(g)(9)'s scope. *See* Appendix of Tribal Codes. Whereas Congress described § 922(g)(9)'s "misdemeanor crime of domestic violence" as occurring when the perpetrator's "emotions get the best of him" and "[h]e loses control" (142 Cong. Rec. S11,876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)), many Tribal Codes limit their prosecutions of domestic violence crimes to conduct implicating a "conscious disregard" for the safety and welfare of the perpetrator's intimate partner. *See* Appendix of Tribal Codes.

In contrast to crimes committed with a lesser *mens rea* such as negligence, "recklessness requires conscious disregard of a risk of a harm that the defendant is aware of—a volitional requirement absent in negligence." *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001). Consequently, convictions for reckless domestic violence crimes in Tribal Courts fall well-within the Lautenberg Amendment's intended scope.

For example, the Pascua Yaqui's Tribal Code ("Pascua Yaqui Code") defines a crime of domestic violence to be "any act or attempt[] to commit [] an offense defined in Title 4" of the Pascua Yaqui Code within the context of an intimate relationship, as defined in § 3-10(A)(1)-(4). *See* 4 Pascua Yaqui Tribal Code ("PYTC"), tit. 4, ch. 3, § 3-10(A), (1)-(4).[22] Assault, which is included in Title 4, is defined as as "[i]ntentionally, knowingly or *recklessly* causing any physical injury to another person." 4 PYTC § 1-

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[22] The Pascua Yaqui Tribal Code ("PYTC") is available online at: http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/docs/4_PYTC/2_Sex_Offenses.pdf.

130(A)(1). (emphasis added). The Pascua Yaqui Code defines "recklessly" as:

> [M]ean[ing] with respect to a result or to a circumstance described by a statute defining an offense that a person is aware of and *consciously disregards a substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

Id. § 1-41(A)(3). (emphasis added).

The Confederated Tribes of the Umatilla Indian Reservation Criminal Code ("Umatilla Code") allows for the prosecution of domestic violence crimes predicated on an underlying crime defined in the Umatilla Code committed within the context of an intimate relationship, as defined in Chapter 1, § 1.01.[23] *See* Confederated Tribes of the Umatilla Indian Reservation Criminal Code ("CTUIRCC"), §§ 1.01, 1.02(B). The Umatilla Code, therefore, does not preclude the prosecution of a domestic violence crime simply because it was committed with recklessness. For instance, the crime of assault is defined as "[i]ntentionally, knowingly or *recklessly* caus[ing]

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[23] The Confederated Tribes of the Umatilla Indian Reservation Criminal Code ("Umatilla Code") is available online at: http://ctuir.org/system/files/Criminal%20Code.pdf.

physical injury. . . ." *Id.* § 4.74(A)(1) (emphasis added). "Recklessly" is defined as:

> [W]hen . . . a person is aware of and *consciously disregards a substantial and unjustifiable* risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Id. § 4.05(A)(9) (emphasis added).

These Tribal Code definitions of "recklessness"—as well as those listed in the Appendix of Tribal Codes—establish a more stringent *mens rea* threshold than the domestic violence Congress described in creating § 922(g)(9). In articulating the underlying conduct that would fall within the Amendment's reach, Senator Lautenberg characterized the usual course of events surrounding a crime of domestic violence as occurring:

> [W]hen things get rough and the stresses of life build, [and the defendant] loses his temper because *his emotions get the best of him*. He *loses control*, flies into a rage and then strikes out violently at those closest to him.

142 Cong. Rec. S11,876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added).[24] In

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[24] *See United States v. Nason*, 269 F.3d 10, 17 (1st Cir. 2001) ("While the remarks of the chief sponsor of a bill by no means control a court's construal of the enacted statute, they nonetheless can provide reliable insights into its construction.") citing *N. Haven Bd. Of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982)).

contrast to criminals who act knowingly or intentionally, the drafters of § 922(g)(9) conceived of domestic violence perpetrators as "people who have shown that they *cannot control themselves* and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones." 142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (emphasis added). Again, Senator Lautenberg explained the sort of criminal conduct that inspired the legislation as follows:

> As arguments often do, it will escalate, and this time, as before, it will get out of control. As their children huddle in fear, the anger will get physical, and almost *without knowing what he is doing*, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer.

142 Cong. Rec. S11,876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added). As Congress noted in enacting the Lautenberg Amendment, individuals who act recklessly, lose control, and/or beat women in a fit of rage are precisely the type of individuals who should not be allowed to possess firearms. *See id.* Nothing in the plain text of the statute, or the legislative history, gives any indication that Congress considered individuals who abuse women *recklessly* to pose less of a risk than individuals who commit domestic abuse *intentionally*. If anything, it is clear that Congress intended to keep firearms out of the hands of domestic violence offenders who abuse women "without knowing what [they are] doing." *Id.*

Congress further recognized that even where the underlying conduct may have been initially classified as "intentional," many prosecutions for domestic

violence crimes result in plea bargains that classify the conduct as a lesser offense, either without a *mens rea*, or a *mens rea* constituting something less than knowing or intentional. *See* 142 Cong. Rec. S10,380 (daily ed. Sept. 12, 1996) (noting that in the context of domestic violence convictions, "plea bargains often result in misdemeanor convictions for what are really felony crimes.") (statement of Sen. Feinstein); 142 Cong. Rec. S11,876 (daily ed. Sept. 30, 1996) ("[M]ost wife beaters, [] plead[] down to a misdemeanor and g[e]t away with a slap on the wrist.") (statement of Sen. Lautenberg). That is, "[o]utdated or ineffective laws often treat domestic violence as a lesser offense." 142 Cong. Rec. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein).

Consequently, Congress recognized it could not render § 922(g)(9) contingent upon a threshold label that, in many instances, would not be met. Instead, Congress created the "amendment [to] look[] to the type of crime, rather than the classification of the conviction." 142 Cong. Rec. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein); *see also* 142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (stating that the Amendment was fashioned with an understanding that "[d]omestic violence, no matter how it is labeled, leads to more domestic violence . . . .") (statement of Sen. Lautenberg).

As the aforementioned Tribal Codes—and those listed in the Appendix of Tribal Codes—demonstrate, tribal prosecutions for reckless domestic violence crimes require the establishment of a *mens rea* greater than the congressionally described "loss of control" or "fit of rage" that led to § 922(g)(9)'s enactment. There can be no question, therefore, that tribal prosecutions for reckless domestic violence crimes fall well within

the scope Congress intended to establish in the Lautenberg Amendment.

There is no statutory text—nor legislative history—to support the conclusion that Congress intended to exclude tribal court prosecutions for reckless domestic violence crimes from the ambit of the Lautenberg Amendment's firearm prohibition. If this Court adopts Petitioners' interpretation and eliminates reckless acts of domestic violence from § 922(g)(9)'s reach, Native women and children will lose a critical safeguard that protects them from perpetrators who repeatedly, and with increasing severity, act with a conscious disregard for their safety and welfare.

Excluding reckless acts of domestic violence from § 922(g)(9) is not what Congress intended.

CONCLUSION

The decision of the First Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATEMENTS OF ADDITIONAL *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of respondents.

American Indians Against Abuse ("AIAA") is a Wisconsin not-for-profit incorporated in 1991. AAIA is a statewide sexual assault and domestic violence tribal coalition serving Wisconsin's eleven Tribes and member programs by providing education, support, and technical assistance to enhance and strengthen the response to victims of domestic violence, sexual assault, dating violence, and stalking. AIAA's trainings, community awareness, and collaborative events are designed to be reflective of and have relevance to our local, regional, and nationwide indigenous people and culture.

The **First Nations Women's Alliance** is a North Dakota not-for-profit organization incorporated in 2008 (http://www.nativewoman.org/). It is the mission of the First Nations Women's Alliance to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. The Alliance is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in our communities.

The **Hopi-Tewa Women's Coalition to End Abuse** is an Arizona not-for-profit organization incorporated in 2009. The Coalition is a tribal domestic violence and sexual assault coalition located on the Hopi Reservation in northeast Arizona. The coalition provides training, technical assistance, policy development, advocacy support and education to the Tribal

Government, program partners and community. The Coalition's mission is to advocate for a coordinated and effective response system that creates a safety net towards building healthy communities, while embracing the strength of Hopi cultural values and traditions.

Mending the Sacred Hoop is a Minnesota not-for-profit organization incorporated in 2006 (www.mshoop.org). Mending the Sacred Hoop works from a social change perspective to end violence against Native women and children while restoring the safety, sovereignty, and sacredness of Native women. Mending the Sacred Hoop is committed to strengthening the voice and vision of Native peoples through grassroots organizing, as well as restoring the leadership of Native women in addressing and ending domestic and sexual violence.

The **Minnesota Indian Women's Sexual Assault Coalition** is a Minnesota not-for-profit organization incorporated in 2004 (www.miwsac.org). The Coalition is a statewide tribal coalition and a national tribal technical assistance provider. The Coalition works with 11 Tribes in Minnesota and more than 25 Tribes nationwide. The Coalition works to address sexual violence and sex-trafficking of Native women, and the Coalition's vision is to create safety and justice through the teachings of our grandmothers.

The **Montana Native Women's Coalition** ("MNWC") is a Montana not-for-profit organization incorporated in 2007 (www.mtnativewomenscoalition.org). MNWC is the Indigenous Circle of Seven relations with a common goal to honor each Tribe's spirituality and culture. MNWC provides collaborative, cohesive, and respectful efforts to end sexual and domestic violence within the Indian Nations and the State of Montana.

The **Native Alliance Against Violence** is an Oklahoma not-for-profit organization incorporated in 2009 (www.oklahomanaav.org). The Native Alliance Against Violence is Oklahoma's only tribal domestic and sexual violence coalition. Through the Spirit of respect and cooperation, the Native Alliance Against Violence strives to unify tribal service programs throughout Oklahoma by providing culturally appropriate technical assistance, training and support to eliminate domestic violence, sexual violence, dating violence, stalking and sex trafficking to restore balance and safety for Native communities.

The **Native Women's Coalition** is an Idaho not-for-profit organization incorporated in 2009. The Coalition provides awareness through education, training and technical assistance to Native and non-Native service providers to stop domestic violence and sexual assault against Native women and children, both on reservation and in rural and urban off reservation communities. The Coalition believes it is essential that all providers understand the unique need for the delivery of culturally appropriate services to victims, especially child victims.

The Native Women's Society of the Great Plains is a South Dakota not-for-profit organization incorporated in 2008 (www.nativewomenssociety.org). The Coalition's mission is to promote the safety of Native women. The Coalition is comprised of organizations that provide shelter and services to Native women experiencing violence in their homelands.

Restoring Ancestral Winds, Inc. ("RAW") is a Utah not-for-profit organization incorporated in 2013 (www.restoringancestralwinds.org). The mission of

RAW is to support healing in our indigenous communities. RAW will advocate for healthy relationships; educate our communities on issues surrounding stalking, domestic, sexual, dating and family violence; collaborate with Great Basin Region community members and stakeholders; and honor and strengthen traditional values with all our relations.

The **Seven Dancers Coalition** is a New York not-for-profit organization incorporated in 2009 (www.sevendancerscoalition.com). The Coalition is located in upstate New York, and thus the Coalition's territory straddles the United States and Canadian border. The Coalition is established to bring awareness and prevention on SA, DA, Campus Safety, Teen Dating, Stalking and Sex Trafficking. The Coalition's mission is to uplift families of indigenous communities by educating and restoring traditional values with the purpose of strengthening self-confidence and dignity. We strive for an environment of peace and tranquility in order to heal the damaged spirit.

The **Southwest Indigenous Women's Coalition** ("SWIWC") is an Arizona not-for-profit organization incorporated in 2006 (www.swiwc.org). SWIWC is located in Mesa, Arizona, and works to end domestic and sexual violence against Native women. Through training, technical assistance, policy development, and outreach education, SWIWC helps to build the capacity of Tribes in Arizona to better address and respond to the violence occurring in their communities.

The **Strong Hearted Native Women's Coalition, Inc.** is a California not-for-profit organization incorporated in 2006 (www.strongheartedwomen.org). Strong Hearted Native Women's Coalition was founded in 2005 to bring awareness against Sexual Assault,

Domestic Violence, Youth Violence, and Stalking in North County of the San Diego County. Native women from the Indian reservations of Rincon, Pauma, Mesa Grande, Santa Ysabel, La Jolla, San Pasqual, Los Coyotes, Pala, and Inaja/Cosmit make-up our coalition membership. Over the years, our coalition has expanded to include Tribes from all of Southern California as well as other Tribes throughout the State of California. The purpose of the Coalition is to enhance the capacity of survivors, advocates, Indian women's organizations, and victim services providers to form non-profit, nongovernmental tribal domestic violence and sexual assault coalitions to advance the goal of ending violence against American Indian and Alaskan Native women. The overarching goal of the Strong Hearted Native Women's Coalition program is to increase the amount of dedication to improving systemic and community responses to victims and to raise awareness, educate, and to provide technical assistance, training, and supportive services for victims of sexual assault, domestic violence, dating violence, stalking, and human/sex trafficking, including cultural and unique barriers facing Native American Women. By honoring our women ancestors, we advocate for women and their families and promote safety and a traditional non-violent lifestyle. The Coalition works towards empowering women with the tools for independence, courage, and a strong direction to make healthy life choices for herself, her children, and family.

The Tribal Law and Policy Institute ("TLPI") is a California not-for-profit organization incorporated in 1996 (www.tlpi.org). TLPI is a Native American owned and operated non-profit, organized to design and deliver education, research, training, and technical assistance programs which promote the

enhancement of justice in Indian Country and the health, well-being, and culture of Native peoples. TLPI has been extended significant resources and time in assisting Tribes to develop their domestic violence criminal codes and implement VAWA § 904's SDVCJ.

Uniting Three Fires Against Violence is a Michigan not-for-profit organization incorporated in 2009 (www.unitingthreefiresagainstviolence.org). Uniting Three Fires Against Violence ("UTFAV") is a statewide tribal coalition against domestic and sexual violence. UTFAV's mission is "[t]o support Michigan Tribes in promoting the social change necessary to address the disproportionate rates of violence impacting our communities." UTFAV envisions: (1) empowered Native American survivors with access to essential and culturally appropriate services throughout the State of Michigan; (2) tribal communities that have access to the resources necessary to provide the identified services: and (3) tribal, state and federal responses that are guided by culturally appropriate and trauma informed practices.

The **Wabanaki Women's Coalition** ("WWC") is a Maine not-for-profit organization incorporated in 2013 (www.wabanakiwomenscoalition.org). The mission of the WWC is to increase the capacity of tribal communities to respond to domestic and sexual violence and influence tribal, national, and regional systems to increase awareness, safety, justice, and healing for all our relations. The WWC's vision is to guide the evolution of systems and policies that reflect the WWC's Wabanaki voice on behalf of survivors of domestic and sexual violence. The vision is also to create a technical resource center that affirms Wabanaki cultural values and tribal sovereignty, and empowers tribal service

providers to serve, educate and influence their communities in an effective and uniform way. The WWC also seeks to be recognized as the informed resource for issues on Wabanaki survivors of domestic and sexual violence.

The Washington State Native American Coalition Against Domestic Violence & Sexual Assault is a Washington not-for-profit organization incorporated in 2005 (www.womenspirit.net). The Coalition envisions a Nation where Native women live safely and where all citizens embrace these core values as they strive towards a collective vision of safety. The Coalition believes in the empowerment of survivors, restoration of spiritual and traditional practices, human rights advocacy, restorative justice, and promoting healing from trauma.

The **Yupik Women's Coalition** ("YWC") is an Alaska not-for-profit organization incorporated in 2007 (www.yupikwomen.org). The YWC strives to promote safety of women through education and advocacy. The YWC is committed to organize community efforts to end violence against women and children with Yup'ik villages through strengthening the traditional Yup'ik beliefs and teachings that have guided the Yup'ik people for thousands of years. The YWC is dedicated to the safety of women and believes in all the rights of all people to live without fear, threat, violence, and oppression.

* * *

APPENDIX B:

TRIBAL CODES ADDRESSING DOMESTIC VIOLENCE CRIMES[1]

Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation 10a
Confederated Tribes of the Colville Reservation ... 12a
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians 14a
Confederated Tribes of Siletz Indians 15a
Confederated Tribes of the Umatilla Indian Reservation 18a
Coushatta Tribe of Louisiana 20a
Eastern Band of Cherokee Indians..... 22a
Grand Traverse Band of Ottawa and Chippewa Indians..... 25a
Hoh Indian Tribe 27a
Hopi Tribe 29a
Little River Band of Ottawa Indians 30a
Little Traverse Bay Bands of Odawa Indians..... 32a
Kalispel Tribe of Indians..... 33a
Makah Tribe 34a
Mississippi Band of Choctaw Indians..... 36a
Navajo Nation..... 38a
Northern Cheyenne Tribe 40a
Nottawaseppi Huron Band of the Potawatomi 41a

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[1] This Appendix demonstrates the variance of Tribal Codes and the laws that criminalize domestic violence across Indian Country. The Appendix is a sampling of extant Tribal Codes and therefore does not constitute an exhaustive list of the Tribal Codes that allow for the prosecution of domestic violence crimes with a *mens rea* other than intentional and/or knowing.

Omaha Tribe 42a
Pascua Yaqui Tribe 43a
Poarch Band of Creek Indians 45a
Ponca Tribe of Nebraska 47a
Santee Sioux Nation 49a
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation 50a
Snoqualmie Indian Tribe 52a
Squaxin Island Tribe 53a
Swinomish Tribe 54a
Tulalip Tribes 56a
White Earth Nation of the Minnesota Chippewa .. 58a
White Mountain Apache Tribe 59a

Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation

7 Fort Peck Tribes Comprehensive Code of Justice § 245, http://www.fptc.org/ccoj/title_7/sections/sec_245.pdf

> A person who attempts by physical menace to put a family member or household member in fear of serious bodily harm, or by physical menace causes another to harm himself/herself, is guilty of domestic abuse . . . .
>
> > (1) Conviction for domestic abuse shall be punishable as a Class A misdemeanor . . .

2 Fort Peck Tribes Comprehensive Code of Justice § 106, http://www.fptc.org/ccoj/title_2/sections/sec_106.pdf

> (b) Criminal jurisdiction over non-Indian domestic or dating violence. The Fort Peck Tribal Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of dating violence or domestic violence against an Indian victim within the Fort Peck Tribes' Indian country provided the non-Indian has sufficient ties to the Fort Peck Tribes.

E.g., 7 Fort Peck Tribes Comprehensive Code of Justice § 231, http://www.fptc.org/ccoj/title_7/sections/sec_231.pdf

> Simple assault. A person who
>
> > (a) Intentionally causes bodily injury to another; or
> >
> > (b) Recklessly or negligently causes bodily injury to another with a deadly weapon; or

(c) Attempts by physical menace to put another in fear of serious bodily harm, or by physical menace causes another to harm himself/herself is guilty of an assault.

Simple assault is a Class A misdemeanor.

7 Fort Peck Tribes Comprehensive Code of Justice § 103, http://www.fptc.org/ccoj/title_7/sections/sec_103.pdf

(c) "Reckless". Conduct is reckless if, with respect to a result or to a circumstance, a person consciously disregards a substantial risk that such result will occur or that such a circumstance exists, and the risk is of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the situation.

Confederated Tribes of the Colville Reservation

Colville Confederated Tribes Code § 5-5-3 (WESTLAW)[2]

(d) "Domestic Violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense or culturally appropriate discipline of a child:

(1) Attempting to cause or causing physical, mental or emotional harm to another family or household member;

(2) Placing a family or household member in reasonable fear of physical harm to him or herself or another family or household member. This fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets;

(3) Causing a family or household member to engage involuntarily in sexual activity, which includes, but not limited to, through coercion, intoxication, force, threat of force, or duress; or

(4) Attempting to commit or committing any criminal offense under Colville Tribal law against another family or household member.

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[2] "(WESTLAW)" indicates the Tribal Code referenced is available on Westlaw's online database.

E.g., Colville Confederated Tribes Code § 3-1-11 (WESTLAW)

> Reckless Endangerment. Any person who shall recklessly engage in conduct which places or may place another human being in danger of death or serious bodily injury shall be guilty of Reckless Endangerment. Reckless Endangerment shall be presumed whenever a person shall knowingly point or discharge a firearm at or in the direction of another whether the actor believes the firearm to be loaded or not. Reckless Endangerment is a Class A offense.

Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

4 Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians Tribal Code § 4-11-3, http://www.narf.org/nill/codes/cooscod/4_4-11.pdf

(a) "Abuse" - the occurrence of one or more of the following acts between family or household members:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury.

(2) Intentionally, knowingly or recklessly placing another in fear of imminent bodily injury.

(3) Causing another to engage in involuntary sexual relations by force or threat of force.

Confederated Tribes of Siletz Indians

Siletz Tribal Code § 8.102 (WESTLAW)

(a) Unless the context requires otherwise, terms used in the Domestic and Family Violence Ordinance are defined as follows.

(1) "Domestic or family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense by the victim:

(2) attempting to cause or causing physical harm, bodily injury, or assault to another family or household member;

(3) placing a family or household member in fear of the infliction of physical harm, bodily injury, or assault; or

(4) causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

Siletz Tribal Code § 8.103 (WESTLAW)

(a) A "crime involving domestic or family violence" occurs when a family or household member:

(1) purposely or knowingly causes bodily injury to a family or household member;

(2) purposely or knowingly causes apprehension of bodily injury to a family or household member;

(3) purposely or knowingly causes emotional distress of a family or household member; or

(4) commits one or more of the following offenses, as defined by the Confederated Tribes

of Siletz Indians Criminal Code, against another family or household member:

(A) Assault (First, Second, Third or Fourth Degree Assault);

(B) Menacing;

(C) Intimidation (First or Second Degree);

(D) Harassment;

(E) Burglary (First or Second Degree);

(F) Criminal Trespass (First or Second Degree);

(G) Criminal Mischief (First, Second or Third Degree);

(H) Custodial Interference (First or Second Degree);

(I) Theft (First, Second, or Third Degree, and Aggravated First Degree);

(J) Disorderly Conduct;

(K) Stalking;

(L) Arson;

(M) Homicide (Murder, First or Second Degree Manslaughter, Criminally Negligent Homicide);

(N) Kidnapping (First or Second Degree);

(O) Any Sex Offense contained in §§ 12.044–12.055; or

(P) Any Weapon Law Violation contained in §§ 12.122–12.128.

E.g., Siletz Tribal Code § 12.031 (WESTLAW)

> Third Degree Assault: Class A. Recklessly causing serious physical injury to another by means of deadly or dangerous weapon or recklessly causing serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

Confederated Tribes of the Umatilla Indian Reservation

Conf. Tribes of Umatilla Indian Res. Crim. Code § 1.01, http://ctuir.org/system/files/Criminal%20Code.pdf

> (X) Domestic Violence. For the purposes of exercising criminal jurisdiction over non-Indians, the term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

Conf. Tribes of Umatilla Indian Res. Crim. Code § 1.02, http://ctuir.org/system/files/Criminal%20Code.pdf

> (B) Criminal Jurisdiction Over Non-Indian Domestic or Dating Violence. The Umatilla Tribal Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of Dating Violence or Domestic Violence against an Indian victim within the Confederated Tribes' Indian country provided the non-Indian has sufficient ties to the Confederated Tribes.

E.g., Conf. Tribes of Umatilla Indian Res. Crim. Code § 4.74, http://ctuir.org/system/files/Criminal%20Code.pdf

> (A) A person commits the crime of assault if the person:

> (1) Intentionally, knowingly or recklessly causes physical injury however slight to another . . .

Conf. Tribes of Umatilla Indian Res. Crim. Code § 4.05, http://ctuir.org/system/files/Criminal%20Code.pdf

> (A) As used in this code unless the context requires otherwise:
>
> . . .
>
> (9) "Recklessly", when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Coushatta Tribe of Louisiana

3A Coushatta Tribal Code § 3A.01.040, http://www.narf.org/nill/codes/coushatta/coutitle3a.html

(c) "Crime involving domestic violence" means one or more of the following crimes when committed by a family or household member against another family or household member:

(1) Offenses listed under 18 U.S.C. 1153, the Major Crimes Act as now or hereafter amended: murder, manslaughter, kidnapping, maiming, felony sexual abuse under chapter 1 09A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and felony theft under section 661 of Title 18.

(2) Offenses listed under the Coushatta Tribe of Louisiana Judicial Code, Title 3, as now or hereafter amended: assault, assault and battery, abductions, subjection to maltreatment, malicious mischief, trespass, and disobedience to lawful orders of court, when the order was entered for the purpose of protecting a victim of alleged domestic violence.

(d) "Domestic Violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

(1) Attempting to cause or causing physical harm to another family or household member.

(2) Attempting to commit or committing a crime involving domestic violence against another family or household member.

> (3) Placing a family or household member in reasonable fear of physical harm to him or herself or another family or household member. This fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets.
>
> (4) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force or duress.

E.g., 3 Coushatta Tribal Code § 3.2.3, http://www.narf.org/nill/codes/coushatta/coutitle3.html

> Simple Assault: A person who . . .
>
> (b) Recklessly or negligently causes bodily injury to another with a dangerous weapon; or

3 Coushatta Tribal Code § 3.1,2, http://www.narf.org/nill/codes/coushatta/coutitle3.html

> (c) "Reckless": Conduct is reckless if, with respect to a result or circumstance, a person consciously and unjustifiably disregards a substantial risk that such a result will occur or that such a circumstance exists, and the risk is of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Eastern Band of Cherokee Indians

Eastern Band of Cherokee Indians Code § 14-40.1, https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR_CH14CRLA_ARTIXCRBOIN_S14-40.1DOVI

(b) Definition. The crime of domestic violence occurs when a person commits one of the following acts against an intimate partner or against a member of such intimate partner's family or household, or against an animal of such intimate partner:

(1) Attempting to cause or causing physical harm, bodily injury, or assault to an intimate partner or to a member of such intimate partner's family or household, or to an animal of such intimate partner;

(2) Placing an intimate partner or a member of the intimate partner's family or household in fear of the infliction of physical harm, bodily injury or assault;

(3) Willfully attempting to cause or causing emotional distress to an intimate partner or to a member of such intimate partner's family or household;

(4) Causing an intimate partner or a member of such intimate partner's family or household to engage involuntarily in sexual activity by force, threat of force, or duress; or

(5) Committing any willful violation of a court order intended to protect the intimate partner or a member of such person's family or household;

(6) Committing one of the following offenses, as defined by the Eastern Band of Cherokee Indians Criminal Code, against an intimate partner or against a family member, household member, or animal of such intimate partner:

a. Injuring real property (§ 14-10.11);

b. Injuring telephone, wires or other telephone equipment (§ 14-10.14);

c. Criminal trespass (§§ 14-10.15, 14-10.16, and/or 14-10.17);

d. Burglary (§ 14-10.40);

e. Breaking and entering (§ 14-10.14);

f. Criminal mischief (§ 14-10.9);

g. Arson (§§ 14-10.50, 14-10.51, and/or 14-10. 52);

h. Assault (§§ 14-40.10, 14-40.11, 14-40.12);

i. Maiming (§ 14-40.14);

j. Discharging a firearm into an occupied building (§ 14-40.15);

k. Harassment; telephone harassment (§§ 14-25.13 and/or 14-5.3);

l. Kidnapping (§ 14-40.30);

m. False imprisonment (§ 14-40.31);

n. Custodial interference (§ 14-40.32);

o. Homicide (§§ 14-40.40 and/or 14-40.41);

p. Sex offenses–including rape, taking indecent liberties with children, aggravated sexual abuse, sexual abuse, sexual abuse of

minor or ward (§§ 14-20.1, 14-20.2, 14-20.3, 14-20.4);

q. Stalking (§ 14-5.5);

r. Communicating threats (§ 14-5.2);

s. Harassment (§§ 14-5.3 and/or 14-25.13);

t. Weapons law violations (§§ 14-34.10, 14-34.11, 14-34.12, 14-34.13, and/or 14-34.14);

u. Cruelty to animals (§ 14-5.20);

The commission of one of the above-referenced crimes against an intimate partner or against a member of such party's family or household, or against an animal of such party shall trigger the application of this ordinance.

Eastern Band of Cherokee Indians Code § 14-10.51, https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR_CH14CRLA_ARTIIIPRCR_S14-10.51ARSEDE

Arson in the Second Degree: It shall be unlawful to knowingly or recklessly, carelessly, or negligently, without regard to the consequences, start a fire or cause an explosion which:

(1) Endangers human life or safety; or

(2) Damages or destroys the property of another.

Grand Traverse Band of Ottawa and Chippewa Indians

9 Grand Traverse Band Code § 310 (WESTLAW)

(a) "Abuse" means:

(1) Intentionally or recklessly or negligently causing or attempting to cause physical harm or mental anguish to another person; or

(2) Threatening or placing another person in reasonable apprehension of imminent serious physical injury.

. . .

(f) "Domestic Violence" means:

(1) Engaging in any of the following acts against family or household members or persons in a dating relationship:

(A) Attempting to cause or causing physical harm;

(B) Attempting to cause or causing injury to a pet or property damage;

(C) Attempting to cause or causing a family or household member to engage involuntarily in sexual activity by force, threats or duress;

(D) Inflicting injury to household pets, reasonable fear of physical harm, sexual assault, or property damage;

(E) Stalking, as defined in this code;

(2) All crimes involving threats, violence, assault and/or physical or sexual abuse against,

adults, children, the elderly or others enumerated in Title 9 of the Grand Traverse Band Constitution may be charged as domestic violence and those crimes listed under the Major Crimes Act, 18 U.S.C. § 1153.

(3) Any act of self-defense or self-defense of another reasonably taken in response to an act of domestic violence shall not be considered a crime of domestic violence.

9 Grand Traverse Band Code § 102 (WESTLAW)

(e) Mental State: Wanton or Reckless. A person acts "wantonly" or "recklessly" when that person is aware, or should be aware, that certain conduct will endanger the health, safety, or property of others but persists in engaging in the conduct despite the risks.

Hoh Indian Tribe

9 Hoh Tribal Code § 1.5, http://hohtribe-nsn.org/wp-content/uploads/2013/11/Title-9-Domestic-Violence-Anti-Harassment-Code.pdf

> (A) "Abuse" means the infliction of physical harm, bodily injury or sexual assault or the infliction of the fear of imminent physical harm, and includes but is not limited to assault and battery as defined in the Hoh Tribal code.
>
> . . .
>
> (G) "Crime of Domestic Violence" means one or more of the following when committed by a family or household member against another family or household member:
>
> > (1) Offenses listed under 18 U.S.C.SS1153, the Major Crimes Act as now or hereinafter amended: murder, manslaughter, kidnapping, maiming, felony sexual abuse under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and felony theft under section 661 of Title 18.
> >
> > (2) Offenses listed under the Hoh Tribes code, Title 5, as now or hereafter amended: assault, aggravated assault, intimidation, neglect, endangerment, elder abuse, unlawful restraint, kidnapping, aggravated kidnapping, criminal mischief, trespass, and disobedience to lawful orders of court, when the order was entered or the purpose of protecting a victim of alleged domestic violence.

(3) Offenses listed under the Hoh Tribal Code, Title 5, Section 5.17, Sexual Offenses, as now or hereafter amended.

(H) "Domestic Violence" means an act of abuse, as defined in Section 1.5 (A), by a perpetrator or a family member or household member of the perpetrator.

E.g., 5 Hoh Tribal Code § 5.5.05, http://hohtribe-nsn.org/wp-content/uploads/2013/11/Title-5-Law-and-Order.pdf

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person.

(2) Reckless endangerment is a felony if a person under the age of eighteen years or a dependent adult is endangered, in other cases reckless endangerment is a gross misdemeanor.

5 Hoh Tribal Code § 5.2.01, http://hohtribe-nsn.org/wp-content/uploads/2013/11/Title-5-Law-and-Order.pdf

(1) Kinds of Culpability Defined.

. . .

(c) Recklessness. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Hopi Tribe

III Hopi Tribal Code § 3.6.7, http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf

> A person who commits assault, aggravated assault, endangerment, threatening, kidnapping, sexual assault, or sexual conduct with a minor is guilty of domestic violence, a serious offense . . .

E.g., III Hopi Tribal Code § 3.7.1, http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf

> A person commits assault, an offense, by:
>
> . . .
>
> (B) attempting to cause or recklessly causing physical injury to another person; or . . .

III Hopi Tribal Code § 3.2.2, http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf

> APPLICABLE MENTAL STATES. In this Code, unless the context or subject matter otherwise requires:
>
> . . .
>
> "Recklessly" means that a person is aware of and consciously disregards a substantial and unjustifiable risk that a fact exists or that a particular result will occur. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the same situation. A person who creates such a risk but is unaware of it solely because of voluntary intoxication also acts recklessly.

Little River Band of Ottawa Indians

Little River Band of Ottawa Indians Ordinance 04-400-05 (WESTLAW)

3.02. "Abuse" means

a. intentionally or recklessly or negligently causing or attempting to cause physical harm or mental anguish to another person, or

b. threatening or placing another person in reasonable apprehension of imminent serious physical injury.

. . .

3.05. "Domestic Violence" means abuse, mental anguish, physical harm, bodily injury, assault, or the infliction of reasonable fear of bodily injury, between family or household members, or sexual assault of one family or household member by another. All crimes involving threat, violence, assault and physical or sexual abuse against adults, children, elderly or others enumerated in the Law and Order–Criminal Offenses–Ordinance may be charged as domestic violence.

Little River Band of Ottawa Indians Ordinance 03-400-03 (WESTLAW)

3.13. Mental State: "Recklessly" means a person acting recklessly with respect to a material element of an offense, when the person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard involves a gross

deviation of the standard of conduct that a law-abiding person would observe in the actor's situation.

Little Traverse Bay Bands of Odawa Indians

WAGANAKISING ODAWAK STATUTE 2015-018 § VII (B)-(C)

B. Domestic Violence. This crime occurs when violence is committed by a current or former spouse, or intimate partner, of the victim; by a person with whom the intimate partner of the victim shares a child in common; by a person who is cohabitating with, or has cohabitated with the victim as a spouse or intimate partner; or by a person similarly situated to a spouse of the victim under the domestic violence laws of LTBB when the violence occurs within the territorial jurisdiction of LTBB.

C. Definition of Violence. Violence is defined as the act of causing actual physical or mental harm, or causing the fear of imminent physical or mental harm, or engaging in a course of conduct that causes a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or controlled.

Kalispel Tribe of Indians

Kalispel Tribe Law and Order Code § 8-5.01 (WESTLAW)

(1) "Domestic Violence" includes but is not limited to any of the following acts defined below, when committed by one family or household member against another:

(O) Reckless Endangerment: any person who recklessly engages in conduct which creates substantial risk of death or serious physical injury to another.

Makah Tribe

11 Makah Law and Order Code § 11.104, http://www.narf.org/nill/codes/makahcode/makahlawt11.html

(e) "Domestic violence" means any one of the following when occurring between family or household members:

(1) Commission of an act that constitutes a crime under MLOC Title 5, Chapter 1, as now or hereafter amended.

(2) Commission of a crime listed under the Major Crimes Act, 18 U.S.C. §1153, as now or hereafter amended.

(3) Physical harm, bodily injury, assault, sexual assault, property damage, or injury to household pets or the infliction of reasonable fear of physical harm, bodily injury, assault, sexual assault, property damage, or injury to household pets.

"Domestic violence" also means:

(4) Violation of a restraint provision contained in an order entered under this Title or of a comparable provision contained in an order accorded full faith and credit by the court under MLOC 11.7.03, and of which the person had notice at the time of the alleged violation.

"Domestic violence" does not include acts of self-defense or in defense of another reasonably taken in response to acts of domestic violence.

E.g., 5 Makah Law and Order Code § 5.6.11, http://www.narf.org/nill/codes/makahcode/makahlawt5.html#5title

> **Reckless Endangerment. Any person who shall recklessly engage in conduct which creates a substantial risk of death or serious physical injury to another person shall be deemed guilty of reckless endangerment. Reckless endangerment is a Class B offense.**

Mississippi Band of Choctaw Indians

III Mississippi Band of Choctaw Tribal Code § 3-10-2, http://www.choctaw.org/government/tribal_code/TITLE%20III.pdf

(1) "Abuse/Domestic Violence" means the occurrence of one or more of the following acts between family or household members who reside together or who formerly resided together, but does not include acts of self-defense:

(a) attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;

(b) placing, by physical menace or threat, another in fear of serious bodily injury;

(c) causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress;

(d) criminal sexual conduct committed against a minor in violation of this chapter; or

(e) intentionally, knowingly or recklessly causing damage in excess of one hundred dollars ($100.00) to the property of family or household members.

. . .

(5) "Crime involving domestic violence" means when a family or household member commits an act of abuse or domestic violence as defined in this chapter against another family or household member and said act is committed in conjunction with or is an underlying element of one or more of the following crimes:

(a) Crimes Against Persons:

(1) Abduction, §3-3-1;

(2) Assault, §3-3-2;

(3) Battery; §3-3-3;

(4) Aggravated Assault, §3-3-4;

(5) Aggravated Battery, §3-3-5;

(6) Harassment, §3-3-19;

(7) Use of Telephone to Terrify, Intimidate, Threaten, Harass, Annoy, or Offend, §3-3-20;

(8) Sexual Assault, §3-3-29; or

(9) Stalking, §3-3-35

(b) Crimes Against Property:

(1) Criminal Damage to Property, §3-4-2;

(2) Cruelty to Animals, §3-4-9; or

(3) Theft, §3-4-17

(c) Crimes Against the Social Order:

(1) Recklessly Endangering Another, §3-6-11; or

(2) Negligent Use of a Deadly Weapon, §3-6-19

Navajo Nation

9 Navajo Code § 1605, http://www.navajonation council.org/Navajo%20Nation%20Codes/V0030.pdf

A. Domestic abuse

1. "Domestic abuse" means the infliction of any of the following acts upon a victim as defined in § 1605(B):

a. "Assault"—an attempt to cause bodily harm to another through the use of force, or the creation in another of a reasonable fear of imminent bodily harm;

b. "Battery"—application of force to the person of another resulting in bodily harm or an offensive touching;

c. "Threatening"—words or conduct which place another in fear of bodily harm or property damage;

d. "Coercion"—compelling an unwilling person, through force or threat of force, to:

(1) Engage in conduct which the person has a right to abstain from; or

(2) Abstain from conduct which the person has a right to engage in;

e. "Confinement"—compelling a person to go where the person does not wish to go or to remain where the person does not wish to remain;

f. "Damage to property"—damaging the property of another;

g. "Emotional abuse"—using threats, intimidation, or extreme ridicule to inflict humiliation and emotional suffering upon another;

h. "Harassment"—conduct which causes emotional alarm and distress to another by shaming, degrading, humiliating, placing in fear, or otherwise abusing personal dignity. Examples of harassing conduct include, but are not limited to the following:

(1) Unwelcome visiting or following of a person;

(2) Unwelcome sexual propositioning, reference to body functions or attributes, or other comments of a sexual nature;

(3) Unwelcome communications, made by phone or by other methods, containing intimidating, taunting, insulting, berating, humiliating, offensive, threatening, or violent language; or

(4) Unwelcome lingering around the home, school, or work place of a person.

i. "Sexual abuse"—any physical contact of a sexual nature, or attempted physical contact of a sexual nature, with a person, made without that person's consent. Consent cannot be obtained through means such as force, intimidation, duress, fraud, or from a minor under any circumstance; and

j. "Other conduct"—any other conduct that constitutes an offense or a tort under the law of the Navajo Nation.

Northern Cheyenne Tribe

7 Northern Cheyenne Tribal Code § 7-5-10, http://www.narf.org/nill/codes/northern_cheyenne/title7.PDF

> (A) Any person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse.
>
> (B) Definitions:
>
> > (1) "Domestic abuse" is defined as causing harm, bodily injury, assault, or inflicting fear of imminent harm, bodily injury or assault.

7 Northern Cheyenne Tribal Code § 7-1-8, http://www.narf.org/nill/codes/northern_cheyenne/title7.PDF

> (A) Mental States:
>
> . . .
>
> > (3) Recklessly – A person acts recklessly with respect to a circumstance or to conduct described in this Code defining an offense if he is aware of a risk created by the circumstance or by the conduct and disregards the risk. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

Nottawaseppi Huron Band of the Potawatomi

VIII Nottawaseppi Huron Band of Potawatomi Indians Law and Order Code § 1102, http://nhbpi.com/wp-content/uploads/2014/09/Title-VIII-06-Law-and-Order-Code-Amended-8.21.20141.pdf

> A person commits the offense of domestic abuse if he or she intentionally, knowingly or recklessly causes or threatens to cause serious physical pain or injury to any adult member of his or her family or household, a former spouse, an individual with whom the person has a child in common, or an individual with whom the person has had a dating relationship.

VIII Nottawaseppi Huron Band of Potawatomi Indians Law and Order Code § 201, http://nhbpi.com/wp-content/uploads/2014/09/Title-VIII-06-Law-and-Order-Code-Amended-8.21.20141.pdf

> B. Mental States:
>
> . . .
>
> 3. "Recklessly" means conduct where a person acts consciously and disregards a substantial and unjustifiable risk that a particular result will occur as a consequence of that conduct, or a particular circumstance exists with respect to the conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard involves a gross deviation from the standard of care that a law-abiding person would observe in the situation.

Omaha Tribe

11 Omaha Tribal Code § 11-2-1, http://omaha-nsn.gov/wp-content/uploads/2013/08/Title-11-Domestic-Violence.pdf

> (a) Any physical contact with purposefully, knowingly or recklessly results in bodily injury to a household member or former household member shall constitute Domestic Abuse.

5 Omaha Tribal Code § 5-2-2, http://omaha-nsn.gov/wp-content/uploads/2015/10/OTN-Tribal-Code-2013-Title-05-Crimes.pdf

> (3) Recklessly: a person acts recklessly with respect to an element of an offense when he consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Pascua Yaqui Tribe

4 Pascua Yaqui Tribal Code § 3-10, http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/docs/4_PYTC/3_Domestic_Violence_FINAL.pdf

> (A) "Domestic Violence" means any act or attempted to commit is an offense defined in Title 4, Chapters 1 and 2, if any of the following applies:
>
> > (1) The relationship between the victim and the defendant is one of marriage or former marriage or of person residing or having resided in the same household as intimate or dating partners;
> >
> > (2) The victim and the defendant have a child in common;
> >
> > (3) The victim or the defendant is pregnant by the other;
> >
> > (4) The victim and the defendant are or have been in a social relationship of a romantic or intimate nature as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship[.]

E.g., 4 Pascua Yaqui Tribal Code § 1-130, http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/docs/4_PYTC/1_Criminal_Offenses.pdf

> (A) "Assault". A person commits assault by:
>
> > (1) Intentionally, knowingly or recklessly causing any physical injury to another person
> >
> > . . .

4 Pascua Yaqui Tribal Code § 1-41, http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/docs/4_PYTC/1_Criminal_Offenses.pdf

> (A) "Culpable Mental States" means intentionally, knowingly, recklessly or with criminal negligence as those terms are thusly defined:
>
> . . .
>
> (3) "Recklessly" means with respect to a result or to a circumstance described [by] a statute defining an offense that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

Poarch Band of Creek Indians

Poarch Band of Creek Indians Code § 8A-2-3 (WESTLAW)

> (A) A person commits the offense of Criminal Domestic Abuse if he/she commits any of the acts set forth in § 8-2-1 through § 8-2-9, § 8-3-2 through § 8-3-7, or § 8-3-10, of the Tribal Code of the Poarch Band of Creek Indians; or by using threats, intimidation, extreme ridicule, he/she inflicts severe humiliation and emotional suffering upon another; and the victim is a member of the class of persons as defined in § 8A-2-1(B)(1). . . .

E.g., Poarch Band of Creek Indians Code § 8-2-1 (WESTLAW)

> a) A person commits the crime of assault if he:
>
> 1) Purposely or knowingly causes bodily harm to another person; or
>
> 2) Recklessly causes bodily harm to another; or
>
> 3) Negligently causes bodily harm to another with a weapon; or
>
> 4) While driving under the influence of alcohol or a controlled substance or any combination thereof in violation of Section 8-8-1 he causes bodily injury to the person of another with a motor vehicle; or
>
> 5) With intent to prevent a police officer from performing a lawful duty, he causes physical injury to any person.
>
> b) Assault is a Class A Misdemeanor

Poarch Band of Creek Indians Code § 8-1-8 (WESTLAW)

b) DEFINITIONS OF CULPABLE MENTAL STATE

. . .

2) RECKLESSLY

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates a risk but is unaware thereof solely by reason of voluntary intoxication acts recklessly with respect thereto.

Ponca Tribe of Nebraska

Ponca Tribe of Neb. Code § 4-7-1 (WESTLAW)

(1) "Abuse" means the occurrence of one or more of the following acts between family or household members who reside together or who formerly resided together, including spouses or former spouses, children, persons who have had a child in common whether or not they have been married or had lived together at any time, other persons related by blood or marriage, and persons who are presently involved in a dating relationship with each other or who have been involved in a dating relationship with each other:

(a) attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;

(b) placing, by physical menace or threat, another in fear of imminent serious bodily injury;

(c) attempting to cause or intentionally, knowingly or recklessly causing mental and/or emotional injury or anguish; or

(d) attempting to cause or intentionally, knowingly or recklessly refusing to provide for the physical needs of a person, including but not limited to a family or household member, a minor or an incompetent person, by a person with whom the law or society places this responsibility or by a person who has undertaken this responsibility. "Physical needs" include food, clothing, shelter, health care or

other services which are necessary to maintain the person's mental and physical health.

Santee Sioux Nation

VI Santee Sioux Domestic Violence Code § 3, http://www.narf.org/nill/codes/santee_sioux_nation/title6.PDF

(A) "Domestic violence/abuse" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

(1) Attempting to cause or causing physical harm to another family or household member;

(2) Placing a family or household member in fear of physical harm; or

(3) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

Sisseton-Wahpeton Oyate of the Lake Traverse Reservation

Sisseton-Wahpeton Tribal Code § 52-01-04, http://www.swo-nsn.gov/wp-content/uploads/Ch-52-Domestic-Violence-Ordinance-final.pdf

> (6) "Domestic Violence" means the occurrence of one or more of the following acts by a family or household member, a current or former spouse, or intimate partner of the victim, a person with whom the victim shares a child in common, a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or a person similarly situated to a spouse of the victim under the domestic – or family – violence laws of the Sisseton-Wahpeton Oyate:
>
> > a. Attempting to cause or causing bodily injury to the victim; Placing the victim in fear or apprehension of bodily injury;
> >
> > b. Causing the victim to engage involuntarily in sexual activity by force, threat of force, or duress.
>
> This act will exclude any acts of self-defense.

Sisseton-Wahpeton Tribal Code § 52-02-01, http://www.swo-nsn.gov/wp-content/uploads/Ch-52-Domestic-Violence-Ordinance-final.pdf

> "CRIME INVOLVING DOMESTIC VIOLENCE" DEFINED. Crimes involving domestic violence as defined in 52-01-04 are oftentimes already defined under the existing Sisseton-Wahpeton Oyate Tribal Code. The purpose of this ordinance is to clarify that domestic violence is a separate and distinct crime punishable separate and apart from other potential underlying crime/s, and to acknowledge

that when the following crimes are committed against a victim and/or victims, a finding of such shall trigger the application of this ordinance. The crime of domestic violence occurs when an offender commits one or more of the following offenses, as defined in 52-01-04, against another victim and/or victims.

Snoqualmie Indian Tribe

7.1 Snoqualmie Tribal Criminal Code § 4 (WESTLAW)

> Domestic Violence means any act resulting in physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury to oneself or another family member, when committed by one family or household member against another family or household member. Domestic violence shall include, but is not limited to, the following crimes when committed by one family or household member against another family or household member: rape, kidnapping, assault, battery, reckless endangerment, unlawful imprisonment, indecent liberties, intimidation, burglary, trespass, vandalism and unauthorized use, violation of the provisions of a restraining order, or violation of the provisions of a protection order.

E.g., 7.1 Snoqualmie Tribal Criminal Code § 6 (WESTLAW)

> 6.5 Reckless Endangerment
>
> > (a) Any person who recklessly engages in conduct that creates a substantial risk of death or serious bodily injury to another shall be guilty of reckless endangerment.
> >
> > (b) Reckless endangerment shall be a class B offense.

7.1 Snoqualmie Tribal Criminal Code § 4 (WESTLAW)

> Reckless means acting while being aware of a substantial risk and disregarding the risk, when such disregard is a gross deviation from the standard of conduct employed by a reasonable person under similar circumstances.

Squaxin Island Tribe

9 Squaxin Island Tribal Code § 9.12.1035 (WESTLAW)

(A) "Domestic violence" means:

(1) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; or

(2) Sexual assault of one family or household member by another.

9 Squaxin Island Tribal Code § 9.12.1040 (WESTLAW)

(A) Kinds of Culpability Defined.

. . .

(3) Recklessness. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Swinomish Tribe

7 Swinomish Tribal Code § 7-11.040 (WESTLAW)

(A) "Domestic Violence" means:

(A) attempting to cause or causing physical harm, bodily injury, or assault on a family or household member;

(B) placing a family or household member in fear of the infliction of physical harm, bodily injury, or assault;

(C) causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress;

(D) stalking of one family or household member by another family or household member; and/or

(E) any act found by a court to be a crime of domestic violence.

4 Swinomish Tribal Code § 4-01.100 (WESTLAW)

(A) Classification. Any crime may be classified a crime of domestic violence when it is committed by one family or household member against another family or household member.

E.g., 4 Swinomish Tribal Code § 4-02.120 (WESTLAW)

(B) Any assault that is a violation of an order issued under Chapter 7-11, Domestic Violence, and does not amount to a Class A offense under this Chapter is a Class B offense, and any conduct in violation of such a protective order that is reckless and creates a substantial risk of death or serious bodily injury to another person is a Class B offense.

4 Swinomish Tribal Code § 4-01.040 (WESTLAW)

(12) "Recklessly" means being aware of a substantial risk and disregarding the risk when such disregard is a gross deviation from the conduct of a reasonable person.

Tulalip Tribes

4 Tulalip Tribal Code § 4.25.100, http://www.codepublishing.com/WA/Tulalip

(11) "Domestic violence" means a crime committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic violence laws of the Tulalip Tribes.

Domestic violence can take many forms such as but not limited to use of intimidation, contact as defined within this chapter, manipulation, isolation, coercion, fear and/or violence, as well as other tactics of power and control to establish and maintain a relationship of dominance over an intimate partner, but does not include acts of self-defense. The following are examples of what form the domestic violence action may take, but are not an exhaustive list, merely illustrative:

(a) Attempting to commit or committing any criminal offense as defined by TTC Title 3 against an intimate partner;

(b) Physically harming, attempting to physically harm, or placing an intimate partner in reasonable fear of physical harm to himself or herself. Reasonable fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets;

(c) Emotional or mental abuse of the intimate partner, including physical or mental intimidation, controlling activities, or using demeaning language;

(d) Economic abuse of an intimate partner;

(e) Causing an intimate partner to engage involuntarily in sexual activity; or

(f) Preventing the victim from accessing services.

E.g., 3 Tulalip Tribal Code § 3.50.070, http://www.codepublishing.com/WA/Tulalip

Reckless or malicious use of explosives. (1) Every person who shall recklessly or maliciously use, handle, or have in his or her possession any explosive substance whereby any human being is intimidated, terrified, or endangered shall be guilty of a Class C offense.

White Earth Nation of the Minnesota Chippewa

18 White Earth Nation Domestic Violence Code, Ch. 1 § 3 (WESTLAW)

(4) "Domestic violence/abuse" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self defense:

(a) Attempting to cause or causing physical harm to another family or household member;

(b) Placing a family or household member in fear of physical harm; or

(c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

White Mountain Apache Tribe

White Mountain Apache Crim. Code § 6.2, http://www.wmat.nsn.us/Legal/Criminal%20Code%20-%20080614%20-%20IN%20EFFECT.pdf

> (A) "Abuse" means intentionally or recklessly or negligently causing or attempting to cause physical harm or mental anguish to another person, or placing another person in reasonable apprehension of imminent serious physical injury to himself or another.
>
> . . .
>
> (D) "Domestic Violence" means abuse, mental anguish, physical harm, bodily injury, assault, or the infliction of reasonable fear of bodily injury, between family or household members or romantic partners, or sexual assault of one family or household member or romantic partner by another. Domestic violence offenses shall consist of the following:
>
> 1. Assault
> 2. Aggravated Assault
> 3. Assault with a Deadly Weapon
> 4. Assault with Intent to Commit Rape
> 5. Assault with Intent to Cause Serious Bodily Injury
> 6. Assault with Intent to Kill
> 7. Battery
> 8. Criminal Negligence
> 9. Disobedience to a Lawful Order of the Court
> 10. Threatening and Intimidating

11. Unlawful Restraint

12. Sexual Abuse

13. Sexual Conduct with a Minor

14. Sexual Assault

15. Sexual Assault of a Spouse

16. Molestation of Child

17. Child Abuse

18. Sexual Exploitation of a Minor

E.g., White Mountain Apache Crim. Code § 2.4, http://www.wmat.nsn.us/Legal/Criminal%20Code%20-%20080614%20-%20IN%20EFFECT.pdf

(A) A person commits assault by:

(1) Intentionally, knowingly, or recklessly causing any physical injury to another person

. . .

White Mountain Apache Crim. Code § 1.1, http://www.wmat.nsn.us/Legal/Criminal%20Code%20-%20080614%20-%20IN%20EFFECT.pdf

(21) "Reckless" means an act done in conscious disregard of a [sic] unjustifiable risk and in gross deviation from reasonable standards of conduct. Ignorance of reasonable standards of conduct resulting from voluntary intoxication is no defense to recklessness.